DOCKET

No. 08-88
Title: Vermont, Petitioner
v.
Michael Brillon
Docketed: July 18, 2008
Lower Ct: Supreme Court of Vermont
Case Nos.: (2005-167)
Decision Date: March 14, 2008
Rehearing Denied: April 25, 2008
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Jul 15 2008	Petition for a writ of certiorari filed. (Response due August 18, 2008)
Aug 12 2008	Brief of respondent Michael Brillon in opposition filed.
Aug 12 2008	Motion for leave to proceed in forma pauperis filed by respondent Michael Brillon.
Aug 27 2008	DISTRIBUTED for Conference of September 29, 2008.
Oct 1 2008	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Oct 1 2008	Petition GRANTED.
Nov 7 2008	SET FOR ARGUMENT ON Tuesday, January 13, 2009.
Nov 14 2008	Brief amici curiae of Utah, et al. filed.
Nov 17 2008	Joint appendix filed. Statement of costs received.
Nov 17 2008	Brief of petitioner Vermont filed.
Nov 21 2008	Brief amici curiae of Vermont Network Against Domestic and Sexual Violence, et al. filed.
Nov 24 2008	Brief amicus curiae of United States filed.
Nov 24 2008	Brief amici curiae of National Governors Association, et al. filed. (Distributed)
Nov 28 2008	CIRCULATED.
Dec 15 2008	Record received from the Supreme Court of Vermont (1 box)
Dec 16 2008	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Dec 17 2008	Brief of respondent Michael Brillon filed. (Distributed)
Dec 23 2008	Brief amici curiae of Retired State Court Justices filed. (Distributed)
Dec 24 2008	Brief amici curiae of American Civil Liberties Union, et al. filed. (Distributed)
Jan 6 2009	Reply of petitioner Vermont filed. (Distributed)
Jan 6 2009	Letter from counsel for the petitioner seeking permission to lodge copies of related non-record material.
Jan 9 2009	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Jan 9 2009	Letter from counsel for the respondent opposing petitioner's lodging request.
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PETITION FOR WRIT OF CERTIORARI

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Supreme Court, U.S.
FILED

08-88 JUL 15 2008

OFFICE OF THE CLERK
William K. Suter, Clerk

No. ____

In the Supreme Court of the United States

STATE OF VERMONT,
Petitioner,

v.

MICHAEL BRILLON,
Respondent.

On Petition for a Writ of Certiorari to the Vermont Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether continuances and delays caused solely by an indigent defendant's public defender can arise to a speedy trial right violation, and be charged against the State pursuant to the test in *Barker v. Wingo*, 407 U.S. 514 (1972), on the theory that public defenders are paid by the state (with a small "s").

2. Whether the right to counsel, as established in *Gideon v. Wainwright*, 372 U.S. 335 (1963), should result in broader speedy trial rights to indigent defendants than defendants who are able to retain private counsel, such that only delays by private counsel get charged against the defendant under the *Barker v. Wingo* test.

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INTRODUCTION

In what appears to be a first in the history of American jurisprudence, the Vermont Supreme Court has vacated a felony conviction and barred a retrial due to speedy trial right violations that were caused *solely* by the defendant and his public defender(s). While state and federal courts across the country have ruled that delays caused by a defendant's counsel are charged against the defendant under the *Barker v. Wingo*, 407 U.S. 514, 530 (1972) test, the Vermont Supreme Court found that delays in this case were caused by the "the failure of several of defendant's assigned counsel, over an inordinate period of time, to move his case forward," App. 28, and that these failures were part of "the criminal justice system provided by the state." App. 27. Accordingly, even though the Vermont Supreme Court did not find any fault whatsoever with the prosecution, the court directed the trial court to vacate the conviction and dismiss the case with prejudice. App. 38.

This ruling turns thirty-six years of jurisprudence into chaos. Public defenders now have the incentive to delay their cases in the hope that their convicted clients may one day go free due to the delay. Indigent criminal defendants who face certain conviction and lengthy sentences, likewise, have every incentive to delay. Indeed, the defendant in this case had six different assigned lawyers because: he fired his first lawyer (App. 19), his second lawyer withdrew due to a conflict (*id.*), he fired his third lawyer (and also threatened him, forcing his withdrawal) (App. 20), he fired his fourth

lawyer (App. 20-21), and his fifth lawyer withdrew due to modifications in his contract with the Defender General's Office (App. 22-23). By firing three lawyers, Brillon essentially won the lottery with a "get-out-of-jail-free card" made entirely by his own doing.

With this decision, the Vermont Supreme Court has also extended *Gideon v. Wainwright*, 372 U.S. 335 (1963), to provide to indigent defendants far greater rights than those who retain private counsel. Delays caused by private counsel do not get charged to the State because those lawyers are not employed by the state.[1] Indigent defendants are immune from these concerns: whatever happens, it is the State's fault. As a result, the State and the trial courts are put in the untenable position of having to consider requests for continuance differently when the request is made by a public defender, because any continuance granted to a public defender will be charged as though it was the prosecution that requested it. The end result is that indigent defendants are actually worse off, for two reasons. First, the State and the trial courts will be compelled to deny requests for continuance made by public defenders, and indigent defendants may be forced to trial before their counsel is ready. Second, the State and the trial courts will be reluctant to agree to any change in assigned counsel because the delays caused by such a change are attributable to the state. In a perverse way, while affording indigent

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[1] We shall follow the Vermont Supreme Court's use of "State" to refer to the prosecution, and "state" to refer to the criminal justice system funded by the state of Vermont. *See* App. 4.

defendants greater rights, the indigent defendant is actually made worse off by this decision.

In light of the chaos that the *Brillon* decision has created in this vital area of criminal law, this Court's authoritative direction is badly needed.

OPINIONS BELOW

The order and judgment of the District Court of Bennington County denying defendant's first speedy trial motion is reprinted at App. 74-79, and the District Court's order denying Defendant's renewed speedy trial motion is reprinted at App. 59-73. These orders are not otherwise published. The Vermont Supreme Court's decision reversing the district court is reprinted at App. 3-58 and is published at *State v. Brillon*, No. 2005-167, 2008 WL 6814252008 (Vt. Mar 14, 2008)

JURISDICTION

The Vermont Supreme Court rendered its decision on March 14, 2008, App. 3, and denied rehearing on April 16, 2008. App. 80. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury. . . .

STATEMENT OF THE CASE

Michael Brillon was charged with felony domestic assault for striking his girlfriend in July 2001. App. 3. Because Brillon had three prior felony convictions, he was also charged as a habitual offender, making him eligible for a life sentence pursuant to 13 V.S.A. § 11. App. 4. Brillon was found guilty after a jury trial in June of 2004, and sentenced to 12 to 20 years. App. 24.

The causes of this three-year delay are not in dispute. The day before his case was scheduled for jury draw, in February 2002, Brillon discharged his public defender because he said his public defender was not ready for trial.[2] App. 19. The trial court granted the public defender's motion to withdraw, and reassigned the case to the first level conflict counsel. *Id.* The first level conflict counsel reported that he had a conflict of interest, and so the court reassigned the case to the second level of conflict counsel (Brillon's third lawyer). *Id.* Three months later, in May of 2002, Brillon tried to fire this lawyer. App. 19. Rather than simply grant Brillon's request, the trial court held a hearing during which Brillon's counsel indicated that he was prepared and

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[2] Vermont funds its public defender system on a statewide, rather than local, basis. The state legislature sets the budget for the Office of Defender General, and the Office of Defender General distributes those funds across the state, including to the Bennington County Public Defenders Office, and to private counsel who are retained under contract to serve as conflict counsel when the Public Defender is removed from a case. *See* 2008 Vt. Laws 90, Sec. 16 and 13 V.S.A. § 5251.

had ample time to go forward. *Id.* But then, during a break in the proceeding, Brillon threatened his lawyer and the lawyer was given permission to withdraw. *Id.* The trial court then assigned the case to the third level of conflict lawyer, which was Brillon's fourth lawyer. *Id.* In November 2002, Brillon requested that his fourth lawyer be fired, and a hearing was held. Brillon's fourth lawyer advised the court that he was getting out of criminal defense work, and that his contract with the Office of the Defender General had expired. App. 21.

There were delays in retaining a fifth, and then a sixth, lawyer for Brillon. Although the court first ordered the Office of Defender General to assign a new lawyer on November 26, 2002, a lawyer (Brillon's fifth) was not assigned until January 15, 2003. App. 21-22. Three months later, that lawyer sought to withdraw due to modifications in his contract with the Office of the Defender General. App. 22-23. For the following four months, Brillon was without counsel, and he filed a pro se motion to dismiss his case due to the delay in bringing his case to trial. *Id.* Brillon's sixth, and final, lawyer was assigned to the case on August 1, 2003. *Id.* On February 23, 2004, Brillon's sixth lawyer filed a motion to dismiss for lack of a speedy trial. App. 23. The trial court denied the motion on April 19, 2004, finding that much of the delay was the result of defendant's own actions and that defendant had failed to demonstrate actual prejudice. *Id.* Defendant's trial took place in June, 2004, and he received a sentence of twelve-to-twenty years in prison. App. 24.

The Vermont Supreme Court reversed, in a three-to-two, sharply divided opinion. The majority found that:

> Given these facts, we conclude that a significant portion of the delay in bringing defendant to trial must be attributed to the state, even though most of the delay was caused by the inability or unwillingness of assigned counsel to move the case forward. The defender general's office is part of the criminal justice system, and ultimately it is the court's responsibility to assure that that system prosecutes defendants in a timely manner that comports with constitutional mandates. While some of the delay in this case certainly is attributable to defendant, a significant portion is attributable to the criminal justice system provided by the state.

App. 27. The dissent, written by Justice Burgess, proclaimed that, "Today the majority frees a convicted woman beater and habitual offender, not because of any infirmity in the evidence or unfair prejudice in the trial by which a jury found him guilty, but because the defendant delayed the proceedings for almost twenty-two months." App. 38.

REASONS FOR GRANTING THE WRIT

The petition should be granted for two reasons. First, the Vermont Supreme Court has upended thirty-six years of jurisprudence by holding that

delays which are caused *solely* by a defendant and his counsel can constitute a speedy trial right violation under *Barker v. Wingo*. This is an important question of federal law which has not been, but should be, settled by this Court. In addition, the Vermont Supreme Court has decided this issue in a way that conflicts with numerous other courts.

Second, this decision impermissibly grants indigent defendants broader rights than those who can retain private counsel, and, at the same time, places indigent defendants in peril of having their cases pushed to trial before their counsel is ready, or being forced to go to trial with a lawyer who otherwise would have been permitted to withdraw.

I. Under *Barker v. Wingo*, Delays Caused by the Defense Should Not Be Charged Against the Prosecution.

In *Barker v. Wingo*, 407 U.S. at 530-31, this Court established a four-part balancing test "which courts should assess in determining whether a particular defendant has been deprived of his [speedy trial] right." The Court identified four factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) the prejudice to the defendant. The issue in this case involves only item (2), the reason for the delay.

At the time of the *Barker* decision, the issue of a delay caused by the defendant or his counsel rising to a speedy trial act violation was simply

unfathomable. Indeed, this Court noted that defendants often delay prosecution *intentionally*:

> A second difference between the right to speedy trial and the accused's other constitutional rights is that deprivation of the right may work to the accused's advantage. *Delay is not an uncommon defense tactic.* As the time between the commission of the crime and trial lengthens, witnesses may become unavailable or their memories may fade. If the witnesses support the prosecution, its case will be weakened, sometimes seriously so. And it is the prosecution which carries the burden of proof. Thus, unlike the right to counsel or the right to be free from compelled self-incrimination, deprivation of the right to speedy trial does not per se prejudice the accused's ability to defend himself.

407 U.S. at 521 (emphasis added). Indeed, when describing factor (2), the reason for the delay, this Court never even suggested the possibility that a speedy trial violation could be caused by a defendant or defendant's counsel. The Court only described the reasons for delay in terms of acts by the prosecution:

> Closely related to length of delay is the reason the government assigns to justify the delay. Here, too, different weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be

> weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

Id. at 531. The Vermont Supreme Court quoted this language regarding "overcrowded courts," and "the ultimate responsibility for such circumstances must rest with the government," *see* App. 15-16, but failed to recognize the important distinction between overcrowded courts (where, presumably, one case among many may get lost in the shuffle), and a situation where defendant and his counsel are solely responsible for the delay.

Following *Barker*, numerous circuit courts have made clear that delays caused by defendants and/or defense counsel cannot arise to a speedy trial act violation. *See, e.g., Rashad v. Walsh,* 300 F.3d 27, 34 (1st Cir. 2002), *cert. denied*, 537 U.S. 1236 (2003) (noting that when "delay is caused by defendant, delay does not count against the state at all"); *Gattis v. Snyder*, 278 F.3d 222, 231 (3d Cir. 2002), *cert. denied*, 537 U.S. 1049 (2002) (noting that, "If the delay is attributable to the defendant, 'he will be deemed to have waived his speedy trial rights entirely,'" *citing, United States v. Manning*, 56 F.3d 1188, 1195 (9th Cir. 1995)); *Vanlier v. Carroll,* 535 F. Supp. 2d 467, 478 (D.Del. 2008) (holding in part

that, "Delays attributable to the defendant are not weighted against the Government"); *Robinson v. Whitley*, 2 F.3d 562, 571 (5th Cir. 1993) (holding that the Sixth Amendment "does not permit a criminal to take advantage of a delay that his own conduct occasioned"); *United States v. Brock*, 782 F.2d. 1442 (7th Cir. 1986) (holding that the two and one-half-year delay between defendant's guilty plea did not violate the right to a speedy trial; delay was the result of defendant's actions); *United States v. Gomez*, 67 F.3d 1515 (10th Cir. 1995), *cert. denied*, *Gomez v. U.S.*, 516 U.S. 1060 (1996) (holding that twelve and one-half month delay did not rise to the level of a constitutional violation; delay attributable to the government was weighed against it only slightly because there was no indication of an attempt to gain a tactical advantage). [3]

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[3] In addition to these cases that we have cited in the First, Third, Fifth, Seventh, Ninth and Tenth Circuits, district courts in the remaining circuits also follow this trend. *See, e.g., State v. Malito*, 2008 WL 907542, at 3 (Conn. Super. March 18, 2008)(finding no constitutional speedy trial violation, in part because, "the record here unambiguously indicates that the defendant bears primary, if not sole, responsibility for the delay..."); *State v. Pittman*, 647 S.E. 2d 144, 156 (S.C. 2007) (finding that defendant's right to a speedy trial was not violated where there was no indication of prosecutorial negligence or intentional delay and defendant had contributed to the delay by asserting complex defenses); *Payne v. Rees*, 738 F.2d 118, 123 (Ky. 1984) (noting that there was no speedy trial violation where, "There was no deliberate effort by the prosecution in this case to delay the trial, rather there was a negligent failure to proceed."); *State v. Woodruff*, 2008 WL 2415316, at 2 (Minn. App. June 17, 2008)(holding that defendant's right to a speedy trial had not been violated based in part because, "there is no evidence that the state intentionally delayed the proceeding and appellant, through his defense counsel, contributed to the delay..."); *Kramer v. State*, 652 S.E.2d 843, 846 (Ga. Ct. App. 2007) (finding no speedy trial violation where, "the delay resulted from numerous continuances from the trial

State courts have tended to follow this pattern as well, *see, e.g.*, *People v. Chavez*, 650 P.2d 1310, 1313 (Colo. App. 1982) (finding no violation where delay was based on defense counsel's inability to try case within the speedy trial deadline); *Thomas v. State*, 933 So. 2d 995, 997 (Miss. Ct. App. 2006), *cert. denied*, *Thomas v. State*, 933 So.2d 982 (Miss. Jul 20, 2006) (noting that "Any delays in the prosecution caused by the defendant are not counted against the State when evaluating an alleged speedy trial violation"); *People v. Simpson*, 34 A.D. 3d 934, 939 (N.Y. App. Div. 2006) (finding that there was no speedy trial violation because "Any delay in the trial was due to proceedings initiated by the defense or ongoing plea negotiations and there is no evidence that the defense was impaired by the delay."); *Davis v. State*, 133 P.3d 719, 723 (Alaska App. 2006) (finding that delay attributed to defense attorney's request for additional time would toll the speedy trial clock); *Gamble v. State*, 85 S.W.3d 520, 524 (Ark. 2002) (noting that delays resulting from the defense requesting continuances or refusing to obtain counsel should not be charged against the state for speedy trial purposes); *People v. Griffin*, 365 N.E.2d 487, 490 (finding that, "Since Griffin, through his attorney, was responsible for the continuance granted...statutory right to a speedy trial was not violated."); *Murray v. State*, 967 So. 2d 1222, 1226 (Miss. 2007) (noting that, "any delay attributable to Murray would toll the running of the 270-day statutory period."); *State v. Craig*, 739

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calendar requested by and granted to Kramer...[T]hese delays cannot be attributed to or weighted against the State.")

N.W.2d 206, 214 (Neb. 2007) (finding that delay solely attributable to the accused will toll the speedy trial period.)

Moreover, when considering the specific issue here -- delays caused by a defendant who has changed his court-appointed counsel -- the courts are unanimous in finding no speedy trial violation. *See, e.g., Roberson v. State*, 864 So. 2d 379, 394 (Ala. Crim. App. 2002), *cert. denied*, (May 16, 2003) (finding no speedy trial violation where defendant was represented by five different attorneys during the pendency of the proceedings, all of whom withdrew due to defendant's uncooperative behavior); *United States v. Lagasse*, No. 06-0249-CR (2d Cir. 2008) (finding no speedy trial violation where defendant's decision twice to discharge his counsel attributed to the delay); *United States v. Sutcliffe*, 505 F.3d 944, 957 (9th Cir. 2007) (finding no speedy trial violation where defendant sabotaged his relationship "with each appointed attorney, necessitating the delays"); *United States v. Brown*, 498 F.3d. 523, 531 (6th Cir. 2007) (finding no speedy trial violation where defendant sought new counsel); *State v. King*, 580 S.E.2d 89, 93 (N.C. Ct. App. 2003) (finding no speedy trial violation where delay was "largely due to defense counsel's trial preparation and the withdrawal of several attorneys due to conflicts with defendant"); *State v. Fischer*, 744 N.W. 2d 760, 770 (N.D. 2008) (finding no speedy trial violation where delays were due to defendant's "dissatisfaction with his attorneys, which resulted in multiple changes of court-appointed counsel"); and *People v. Kaczmarek*, 798 N.E. 2d 713, 719 (Ill. 2003) (finding no speedy trial violation where

defendant was represented by six different attorneys).

Against this overwhelming backdrop, the Vermont Supreme Court chose to rely on two state court decisions that are readily distinguishable. The Vermont Supreme Court relied on dicta in *People v. Johnson*, 26 Cal. 3d 557, 571 (1980), where the California Supreme Court stated that the purpose of the speedy trial right is to protect defendants against delays caused by "not only the prosecution, but the judiciary and those whom the judges assign to represent indigent defendants," but the California court nonetheless affirmed the conviction. Furthermore, under the California law at issue, a finding of a speedy trial violation would "not result in defendants' escaping trial for serious crimes they may have committed." *Id.* at 573. Clearly, the California law and the decision in *Johnson* do not support the Vermont Supreme Court decision in *Brillon*.

The Vermont Supreme Court also relied on an appellate decision from New Mexico, *State v. Stock*, 2006-NMCA-140, 140 N.M. 676, 682 (2006), where the New Mexico court of appeals dismissed a conviction due to speedy trial violations, finding that "both parties bear some responsibility for the delay." The New Mexico Court found that some of the delays were caused by "the neglect of his overworked public defenders," 140 N.M. at 676, but that the state, too, was responsible. The court found that the state acted with "bureaucratic indifference," which was worse than mere negligence, in doing nothing to move the case forward. *Id.* at 683. Unlike the

prosecution in *Stock*, here there is no dispute that the delays in Brillon's case were all caused by Brillon and his counsel.

II. The *Brillon* Decision Affords Greater Protection to Indigent Defendants Over Defendants Who Retain Private Counsel for Speedy Trial Purposes, and Yet, at the Same Time, Places Indigent Defendants at a Disadvantage of Having Their Cases Pushed to Trial Before Counsel is Ready.

The second reason for allowing the writ is that the Vermont Supreme Court has extended *Gideon v. Wainwright* to provide broader speedy trial rights to indigent defendants than defendants who are able to retain private counsel, such that only delays by private counsel get charged against the defendant under the *Barker v. Wingo* test. In addition, while affording indigent defendants greater rights, this ruling also puts indigent defendants at an inherent disadvantage because the State (and the trial courts) must treat every request for a change of counsel and every request for continuance as though it will be charged against the State for speedy trial purposes. Accordingly, indigent defendants are now in peril of being forced to trial before their counsel is ready, and with counsel who otherwise would have been permitted to withdraw, while defendants who can afford counsel do not face these risks.

In *Gideon v. Wainwright*, 372 U.S. at 344, this Court made clear that the right to counsel was required in order to make every defendant "equal" under the law:

> From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

Now, for the first time in the history of our nation, since *Gideon*, the Vermont Supreme Court has acted to provide indigent defendants *greater* rights than those who are able to retain counsel. While all defendants facing a certain conviction and a lengthy sentence may chose as a strategic matter to delay the trial of their case in the hope that the prosecution witnesses may move away or forget the events, such a decision of intentional delay always came with a price: the defendant would have to waive his speedy trial rights. Under the ruling in *Brillon*, however, indigent defendants no longer have this concern. If they delay by firing their assigned counsel, or if their public defender delays by doing nothing for an extended period of time, all of that delay may all be charged against the State under the *Barker v. Wingo* test. Indeed, under *Brillon*, intentional delays may succeed not only in undermining the prosecution's case, but in eliminating the case altogether by getting the case dismissed for speedy trial violations *caused by the defense*. In contrast, defendants who retain counsel do not have this right. Delays caused by private

counsel, or by a defendant who retains private counsel, are all charged to the defendant because his lawyer is not funded by the state. This kind of inequality, determined solely on who pays the lawyer, defies the fundamental purpose behind *Gideon* – which was to level the playing field.

The right to counsel is not absolute. Under *Strickland v. Washington*, 446 U.S. 668, 686 (1984), the "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." In *Brillon*, however, there is no claim that the result was not just. The only issue is that justice was delayed. The Vermont Supreme Court has, in effect, vacated a conviction due to ineffective assistance of counsel when, (1) there was no claim of ineffective assistance of counsel, and (2) there was no claim that the trial had a result that was not just.

It would be one thing, perhaps, if the Vermont Supreme Court had a record before it of a pattern or practice of defendants waiting three years for trial due to an overworked public defender system. It is clear, however, that there was no such record before the court. The majority stated that, "Because of the limited record before us in this case, we cannot be sure if this case represents an aberration or a growing crisis in the provision of defender general services in Vermont." App. 5. Moreover, the dissent wrote that there was no record of a lack of public-defender resources:

> the majority's concern that delay in this case may have been due to inadequate public-defender resources is unsupported by the record. While the defender general obviously had trouble finding counsel during the fourteen months following defendant's threat to his second lawyer, this difficulty appeared no more attributable to lack of resources than to ordinary conflicts of interest, attorney retirement, contract modification, and defendant's own misconduct. None of the delay was shown to be caseload related.

App. 46.

Finally, the irony here is that, in attempting to force the state legislature to provide more public defender funding, *see* App. 5, 37, the Vermont Supreme Court has, in practice, put indigent defendants at a great disadvantage. Under the *Brillon* ruling, all delays caused by an indigent defendant or public defender are now charged against the State under the *Barker v. Wingo* test. This means that every change in assigned counsel, and every continuance, now counts against the State. As a result, the State is required to assess requests for a change in counsel and for continuance one two different tiers: one for requests made by private counsel, and another for requests made by public defenders. If the request that will result in a delay is made by private counsel, the State need not be concerned that the delay might result in a speedy trial violation. On the other hand, the State must look at every request for delay by a public defender

with close scrutiny, as every delay will be charged to the State. As a result, the State is put in the untenable position of treating indigent defendants differently solely because their counsel is retained by the state. Indigent defendants may by forced to trial before their counsel is ready, or may be denied a change in counsel, solely because those delays may one day add up to a speedy trial violation. Alternatively, private counsel will continue to have all the time they require. The net result from the *Brillon* decision is that indigent defendants are worse off, and the State is placed in the impossible (and unlawful) position of having to treat indigent defendants as less-than-equal, which is exactly what this Court was trying to eliminate when it decided *Gideon v. Wainwright.*

In sum, the Vermont Supreme Court has opened a Pandora's box, by crossing a line that no other court has dared to cross, and creating complete chaos in the legal system. This Court's direction and guidance is badly needed.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari. The Court may also wish to consider summary reversal.

Respectfully submitted,

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Counsel for Petitioner

July 15, 2008

APPENDIX

Appendix A

ENTRY ORDER

2008 VT 35

SUPREME COURT DOCKET NO. 2005-167

MARCH TERM, 2007

State of Vermont	)	APPEALED FROM:
	)	
v.	)	District Court of VT
	)	Unit No.2,
Michael Brillon	)	Bennington Circuit
		DOCKET # 957-7-01 Bncr

In the above-titled cause, the Clerk will enter:

The district court's decision denying defendant's motion to dismiss for lack of speedy trial is reversed and the matter is remanded to the district court with directions to set aside the convictions, vacate the sentence, and dismiss with prejudice the charges against defendant.

FOR THE COURT:

_____

Denise R. Johnson, Associate Justice

Dissenting:

Paul L. Reiber, Chief Justice

Brian L. Burgess,
Associate Justice

Concurring:

John A. Dooley
Associate Justice

Marilyn S. Skogland
Associate Justice

April 25, 2008

Appendix B

Supreme Court of Vermont.

STATE of Vermont

v.

Michael BRILLON.
No. 2005-167.

March 14, 2008.

On Appeal from District Court of Vermont, Unit No. 2, Bennington Circuit, David Suntag, J.

William H. Sorrell, Attorney General, and David Tartter and John R. Treadwell, Assistant Attorneys General, Montpelier, for Plaintiff-Appellee.
William A. Nelson, Middlebury, for Defendant-Appellant.

Present: REIBER, C.J., DOOLEY, JOHNSON, SKOGLUND and BURGESS, JJ.

¶1. JOHNSON, J.

In this appeal, we take the extraordinary step of vacating the convictions and dismissing the charges against defendant because he was not prosecuted within a time frame that satisfied his constitutional right to a speedy trial. Defendant was charged with domestic assault after striking his

girlfriend during an altercation in July 2001. Because his assaultive behavior was also a violation of a previous condition of release, the charge was enhanced to a felony domestic assault. The enhanced felony, in turn, allowed the State to prosecute defendant as a habitual offender, making him eligible for a life sentence. Defendant remained incarcerated during the nearly three years that passed before he was finally brought to trial. Following the trial, he was sentenced to serve twelve-to-twenty years in prison. During the pendency of this appeal, the State agreed to a reduced sentence if defendant dropped his appeal, but, on remand, the district court refused to accept the stipulated settlement. We now hold that the convictions must be vacated and the charges against defendant dismissed because he was not prosecuted in a timely manner.

¶2. In arriving at this decision, we acknowledge that much of the delay in prosecuting defendant resulted from the inaction of several of the assigned counsel who represented defendant during the three years he awaited trial. As we discuss in detail below, however, the inaction of assigned counsel does not relieve the state[1] of its duty, through

[1] We do not capitalize the word "state" when referring to the combination of government entities that make up the criminal justice system. We capitalize the word "State" when referring to appellee. Thus, in this opinion, when we attribute delay to the state, we are referring to the criminal justice system in general and not individual prosecutors, who, for the most part, actively sought to have defendant brought to trial in a timely manner.

implementation of the criminal justice system, to provide defendant with a constitutionally guaranteed speedy trial. Indeed, the defender general's office is part of the criminal justice system and an arm of the state. When, as in this case, a defendant presses for, but is denied, a speedy trial because of the inaction of assigned counsel or a breakdown in the public defender system, the failure of the system to provide the defendant a constitutionally guaranteed speedy trial is attributable to the prosecution, and not defendant. See *People v. Johnson*, 26 Cal.3d 557, 162 Cal.Rptr. 431, 606 P.2d 738, 747 (Cal.1980) (en banc) (stating that the purpose of the right to a speedy trial is to protect defendants against delay caused by the willful oppression or neglect of the state or its officers, including "not only the prosecution, but the judiciary and those whom the judges assign to represent indigent defendants").

¶3. Because of the limited record before us in this case, we cannot be sure if this case represents an aberration or a growing crisis in the provision of defender general services in Vermont. If it is the result of inadequate resources given to the defender general's office, it would behoove the Legislature to address the problem before we are confronted anew with the dilemma of dismissing charges and prematurely releasing potentially dangerous individuals into the community.

¶4. Contrary to the assertion of the dissent, we do not take this decision lightly or in disregard of the role of the trial courts. In the dissent's view, this

Court is releasing into society a "woman beater" and "habitual offender" who is guilty of intentionally "sabotag[ing]" his criminal proceedings by "ensnaring" his attorneys in a "ploy" to create conflicts of interest, avoid trial, and ultimately commit a "fraud ... upon the court" in seeking dismissal based on lack of a speedy trial. *Post*, ¶¶ 52, 54, 59. Apparently, the dissent views the trial court, the state's attorney's office, and the defender general's office as passive players helpless to prevent defendant's "monkey-wrenching" "maneuvers." *Post*, ¶¶ 52, 58. Under such a scenario, the trial court would not appear to have ultimate control over, or responsibility for, its own proceedings. Because of defendant's presumed "tactics," the dissent considers the lengthy delay in securing counsel for defendant "unfortunate, but not per se prejudicial." *Post*, ¶¶ 76, 82. The dissent urges us to remand the case, largely so that its assertions about defendant's motives can be proved at a second hearing on his motion for a speedy trial.

¶5. To bolster its theory that defendant is solely responsible for the delay in bringing his case to trial, the dissent examines "related" criminal proceedings involving separate charges and engages in extensive factfinding that attributes motives to defendant. *Post*, ¶ 57. Ironically, at the same time, the dissent accuses the majority of engaging in "appellate fact finding" and expanding the record in an effort "to render judgment on defendant's bare allegations." *Post*, ¶¶ 57, 58 n. 4. Our judgment, however, is not based on "defendant's bare allegations," but rather on the undisputed record in this case, the only case

that is relevant to determining the speedy-trial issue. That record includes the entire procedural history of the case-including the trial court's actions, the statements of withdrawing counsel, the periods of time defendant was without counsel, the period of time it took to bring defendant to trial, and the actions of the state's attorney and defendant. The record reveals, as detailed below, that an unacceptable amount of the delay was not attributable to defendant, but to the system. The dissent glosses over these systemic factors, instead attributing the delays to defendant's supposed fraud upon the court-even though nothing in the record or the trial court's findings support this view. What the dissent misses is that, notwithstanding defendant's actions and motives, it is ultimately the trial court's responsibility to control the proceedings by denying new counsel or continuances if it believes that the defendant is attempting to manipulate the system.

¶6. Therefore, we see no point in remanding this case for the trial court to revisit defendant's motion to dismiss for lack of a speedy trial. The material facts, apparent from the record, are essentially undisputed. Remanding for a post-conviction-relief-like hearing at which all of defendant's assigned counsel would be examined to uncover defendant's underlying motivations would do nothing to further our resolution of the ultimate legal question we must decide. Rather, the undisputed facts need to be examined in light of the relevant legal factors. After doing so here based on the record before us, it is plain that defendant was not prosecuted within a

time frame that satisfied his constitutional right to a speedy trial.

¶7. Before examining the relevant law, we first set forth the historical and procedural facts. Later, within the context of applying the relevant factors established by our law, we will review the factual details concerning the delay in prosecuting defendant.

¶8. The events that led to this appeal stem from defendant's relationship with his former girlfriend, with whom he had a child born in April 2000. As the result of charges arising from an incident in which defendant allegedly slashed the tires on his girlfriend's car, the district court imposed, among others, a condition of release prohibiting defendant from harassing his girlfriend. On July 27, 2001, approximately three weeks after the court's imposition of conditions of release, defendant's girlfriend drove defendant to the local police station for a required check-in before they were to return to the girlfriend's mobile home so that defendant could visit their daughter. Apparently, the girlfriend left after dropping off defendant because she was under the impression that he was going to be arrested. Eventually, the girlfriend's sister gave defendant a ride to the girlfriend's mobile home, where defendant angrily confronted the girlfriend for leaving him at the police station. The girlfriend appeared at the door of the mobile home holding a baseball bat. At one point during the confrontation, the girlfriend attempted to leave with her daughter in her car. As she attempted to do so, defendant struck her in the

face. The police were called, and defendant was arrested.

¶9. Absent aggravating circumstances, a domestic-assault charge is a misdemeanor punishable by no more than one year in prison. 13 V.S.A. § 1042. Due to a combination of circumstances, however, defendant was charged with an enhanced felony and then as a habitual offender facing a potential life sentence. The enhanced felony charge of second-degree aggravated domestic assault resulted from the fact that defendant's assault on his girlfriend also violated the pre-trial condition of release prohibiting defendant from harassing his girlfriend. See 13 V.S.A. § 1044(a)(1) (providing that a person is guilty of second-degree aggravated domestic assault if the person commits domestic assault that causes bodily injury to another person and, in doing so, "violates specific conditions of a criminal court order in effect at the time of the offense imposed to protect that other person"). Moreover, because defendant had been convicted of felonies on three prior occasions, the prosecution also charged defendant as a habitual offender. See 13 V.S.A. § 11.

¶10. Three days after the July 27, 2001 incident, the district court issued a no bail order, and defendant remained incarcerated. On February 16, 2002, following an evidentiary bail hearing that had been continued several times, the trial court ordered that defendant be held without bail pending trial. Finally, after several more continuances, changes of attorneys, and rotations of judges, a trial was held

over three days beginning on June 15, 2004, nearly three years after defendant had been arraigned. Defendant was found guilty and sentenced to serve twelve-to-twenty years in prison. On appeal, defendant argues that the trial court erred by (1) denying his motion to bifurcate the aggravating element of the domestic-assault charge, refusing to allow defendant to stipulate to the existence of the aggravating element in lieu of the State's evidence, and improperly instructing the jury regarding that aggravating element; (2) allowing the prosecutor to ask defendant if he had committed perjury in a prior proceeding; (3) refusing to allow defendant to retract his waiver of a jury trial on the issue of whether he was a habitual offender; and (4) denying his motion to dismiss the charges against him for lack of a speedy trial. We need not address the first three issues because our resolution of the speedy-trial issue determines the outcome of the appeal.

¶11. Both the federal and Vermont constitutions guarantee defendants a right to a speedy trial. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury...."); Vt. Const. ch. I, art. 10 (persons have a right in all criminal prosecutions to "a speedy public trial by an impartial jury"). There is also a Vermont administrative order establishing time periods for bringing defendants to trial in criminal cases, Administrative Order No. 5 ("PROMPT DISPOSITION OF CRIMINAL CASES"), but this Court has ruled that the order does not grant criminal defendants procedural or substantive rights. See *State v. Snide*, 144 Vt. 436, 441, 479

A.2d 139, 142-43 (1984) (noting that a speedy-trial violation is not predetermined by the operation of Administrative Order No. 5, and that the order cannot be invoked by a defendant as a matter of right).

¶12. We apply a well-recognized, albeit amorphous, balancing test set forth by the United States Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), and adopted by this Court, to determine whether there has been a violation of the constitutional right to a speedy trial. See *State v. French*, 152 Vt. 72, 77, 564 A.2d 1058, 1060-61 (1989) (noting that the *Barker* test was adopted by this Court). The balancing test weighs the conduct of the prosecution and the defendant while examining (1) the length of the delay, (2) the reason for the delay, (3) the extent to which the defendant asserted the right, and (4) the prejudice to the defendant. See *Barker*, 407 U.S. at 530; *State v. Keith*, 160 Vt. 257, 266-67, 628 A.2d 1247, 1253 (1993).

¶13. In employing this test, we have characterized our review as deferential to the trial court and yet have independently examined the record and applied the facts to the law. In so doing, we have routinely stated, without discussion, that we review speedy-trial decisions for an abuse of discretion. E.g., *State v. Beer*, 2004 VT 99, ¶ 33, 177 Vt. 245, 864 A.2d 643; Keith, 160 Vt. at 266, 628 A.2d at 1253. Tracking the citations of that standard to previous cases leads us to *State v. Chamberlain*, 131 Vt. 549, 551, 310 A.2d 30, 32 (1973), wherein we held that

implementing Administrative Order No. 5's predecessor rule was "entirely within the discretionary authority of the trial court." This holding evolved over time into assigning an abuse-of-discretion standard for reviewing trial court rulings on constitutional speedy-trial claims. Compare *State v. Unwin*, 139 Vt. 186, 195, 424 A.2d 251, 256 (1980) (noting that "Administrative Order 5 permits but does not require a trial court to dismiss a criminal case which has not proceeded to trial within a certain period," and stating that the issue "is for the sound discretion of the trial court, and will not be disturbed on appeal") with *State v. Roy*, 151 Vt. 17, 36, 557 A.2d 884, 896 (1989) (citing *Unwin* standard of review in the context of a speedy-trial analysis); *French*, 152 Vt. at 75, 564 A.2d at 1060 (citing *Roy* for the proposition that a trial court's ruling on a motion to dismiss for lack of a speedy trial is reviewed for an abuse of discretion); *State v. Lavalette*, 154 Vt. 426, 429, 578 A.2d 108, 110 (1990) (same); *Keith*, 160 Vt. at 266, 628 A.2d at 1253 (citing *French* for the same proposition).

¶14. While the trial court certainly has the discretion to implement Administrative Order No. 5, and we will defer to the trial court's implementation of that order absent an abuse of that discretion, our review of decisions determining whether a defendant's constitutional right to a speedy trial has been violated is not deferential in all respects. In such cases, we are presented with a mixed question of law and fact-that is, whether the trial court's findings are supported by the record and, in turn, whether the record supports the court's legal

determination that the defendant was deprived of his constitutional right to a speedy trial. In this sense, the standard of review is analogous to our review of a trial court's ruling on a motion to suppress evidence in a criminal case. See *State v. Pontbriand*, 2005 VT 20, ¶ 12, 178 Vt. 120, 878 A.2d 227 (applying a mixed standard of review to rulings on motions to suppress); *State v. Freeman*, 2004 VT 56, ¶ 7, 177 Vt. 478, 857 A.2d 295 (same). Because the trial court, as the factfinder, is in the best position to determine the weight and sufficiency of the evidence, we apply a clearly-erroneous standard to the underlying facts found by the court; on the other hand, we review de novo the ultimate legal question of whether the findings and underlying facts demonstrate a violation of a defendant's constitutional right to a speedy trial. Cf. *Berry v. State*, 2004 WY 81, ¶ 17, 93 P.3d 222 (stating that "the constitutional question of whether a defendant has been denied a speedy trial" is examined de novo). To the extent that our prior case law suggests otherwise, it is overruled.

¶15. Having set forth the standard of review, we now examine the four factors that are at the heart of the balancing test for determining whether there has been a violation of the constitutional right to a speedy trial. The first factor, which serves a dual role, is the length of the delay. "Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Barker*, 407 U.S. at 530. If the length of the delay is extreme enough to be presumptively prejudicial without regard to the

reasons for the delay, it triggers review of the other factors to be balanced in determining whether there is a speedy-trial violation. *Id.*; see *Keith*, 160 Vt. at 267, 628 A.2d at 1253 (noting that because the first factor serves as a trigger for review of the other factors, it is unnecessary to examine the reasons for the delay as part of the length-of-delay calculation). If review of the other factors is triggered, the first factor then is balanced along with the other factors in determining whether a speedy-trial violation exists. See *State v. Stock*, 2006-NMCA-140, ¶ 13, 140 N.M. 676, 147 P.3d 885 (applying same test to evaluate speedy-trial claim under New Mexico Constitution).

¶16. In weighing the length of the delay, we must consider "the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim," *Doggett v. United States*, 505 U.S. 647, 652, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992), as well as the nature of the case. See *Barker*, 407 U.S. at 530-31 (noting that "the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge"); *Stock*, 2006-NMCA-140, ¶ 14, 140 N.M. 676, 147 P.3d 885 ("Where a case is simple and relatively easy to prosecute, delay will weigh more heavily against the State because there is less excuse for delay."). Irrespective of the reason for the delay, egregious delay in bringing an incarcerated defendant to trial must be factored against the state in a speedy-trial analysis because, as the Supreme Court emphasized in *Barker*, it is ultimately the government's responsibility to bring a defendant to

trial in a timely matter. See 407 U.S. at 529 (holding that "the primary burden [is] on the courts and the prosecutors to assure that cases are brought to trial"); *Stock*, 2006-NMCA-140, ¶ 17, 140 N.M. 676, 147 P.3d 885 (holding that because the state has the ultimate responsibility of bringing defendants to trial in a timely manner, "the sheer fact of lengthy incarceration or other restraint on liberty should count for something in the speedy trial analysis" even when the defendant bears some responsibility for the delay).

¶17. As the trial court, the parties, and the dissent acknowledge in this case, the three-year delay in bringing defendant to trial far exceeds the minimum length of delay necessary to trigger review of the other factors. See *Keith*, 160 Vt. at 267, 628 A.2d at 1253 (holding that twenty-month delay "far exceeds the length of delay needed to trigger a review of the other three factors"); *Unwin*, 139 Vt. at 195, 424 A.2d at 257 (holding that "a delay of more than six months in a case involving an incarcerated defendant is long enough to require that the other factors be considered"). Moreover, because the length of the delay is extreme and the case is not particularly complex, this factor weighs heavily in favor of defendant. Cf. *Stock*, 2006-NMCA-140, ¶ 18, 140 N.M. 676, 147 P.3d 885 (stating that the first factor weighs heavily in favor of the defendant because "the three and one-half year delay in this [simple] case is particularly egregious").

¶18. The second factor – the "flag all litigants seek to capture," *United States v. Loud Hawk*, 474 U.S.

302, 315, 106 S.Ct. 648, 88 L.Ed.2d 640 (1986) – is the reason for the delay. Deliberate delay on the part of the state intended to hamper the defense would obviously weigh heavily in favor of defendant. *Barker*, 407 U.S. at 531. More neutral reasons for delay, such as overcrowded courts, "should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government." *Id.* Courts have applied the same reasoning with respect to the crowded calendars of public defenders. E.g., *Johnson*, 162 Cal.Rptr. 431, 606 P.2d at 747 (holding that the right to a speedy trial "may also be denied by failure to provide enough public defenders or appointed counsel, so that an indigent [defendant] must choose between the right to a speedy trial and the right to representation by competent counsel").

¶19. For example, in *Stock*, the court considered "the difficult question of whether a defendant's constitutional right to a speedy trial is violated when he is incarcerated and awaiting trial for more than three years, but the delay is in part attributable to the neglect of his overworked public defenders." 2006-NMCA-140, ¶ 1, 140 N.M. 676, 147 P.3d 885. Much of the delay in that case resulted from the defendant's assigned counsel seeking numerous continuances and failing to proceed expeditiously with the case. The court stated that it would be unfair to attribute the delays to the defendant when they were "solely attributable to his counsel" and were not for the defendant's benefit. *Id.* ¶ 21, 147 P.3d 885. Similarly, in *Middlebrook v. State*, 802 A.2d 268 (Del.2002), the Delaware Supreme Court

addressed a speedy-trial claim in a case in which an incarcerated defendant waited nearly four years for trial because of several problems, including the trial court's delay in ruling on a pretrial motion, the rotation of the case among several judges, and the granting of eleven continuances, several of which were requested by defense counsel. While acknowledging that a significant part of the delay resulted from continuances sought by defense counsel, the court concluded that this fact had to be weighed against the state, which had the ultimate responsibility to bring defendant to trial in a timely manner. *Id.* at 274-75; see also *State v. Magnusen*, 646 So.2d 1275, 1281 (Miss.1994) ("A more neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." (Emphasis omitted)).

¶20. With these principles in mind, we examine the reason for the delay in the instant case. Defendant was arraigned on July 30, 2001, three days after the incident that led to the charges against him. He remained in prison on a hold-without-bail order through his trial, which took place in June 2004. At the arraignment, the district court ordered that defendant be held without bail pending an evidentiary hearing, which defense counsel asked to be held at a later date. The evidentiary hearing was scheduled for August 15, but on August 14 the prosecutor and the public defender stipulated to continuing the hearing because defense counsel was

moving his former private practice that day. Defense counsel indicated that defendant, although incarcerated, had consented to the continuance. On September 24, defendant filed a letter with the court complaining that he had been held without bail for more than sixty days, and yet, notwithstanding numerous telephone calls and letters, his counsel had not contacted him or engaged in any discovery in preparation of his defense.

¶21. A bail hearing was convened on October 2, but before the hearing began, defense counsel asked that the hearing be continued because he intended to file a motion to recuse the judge, who had also presided over a relief-from-abuse proceeding stemming from the same incident that led to the criminal charges. Defense counsel explicitly stated that delay resulting from the motion would not be counted toward any speedy-trial claim. The next day, defendant filed a pro se motion to recuse the trial judge, which was denied by the trial judge on October 9 and by the administrative judge on November 20. On December 28, noting that defendant had been incarcerated for five months without even having had a bail hearing, the State asked that the matter be set for trial in February 2002. The court tentatively scheduled the trial for February.

¶22. The bail hearing was finally held on January 16, 2002. That same day, the court issued a written opinion denying bail. The next day, defense counsel sought a continuance of the February trial, arguing that further investigation was necessary to prepare for trial. The trial court denied the motion and set

the jury draw for February 26, with the trial to begin the next day. On February 22, defense counsel again filed a motion to continue, asserting that his case load had made it impossible for him to prepare for trial. He assured the court that defendant understood that delay resulting from the motion would not count with respect to any potential speedy-trial claim. Again, the district court denied the motion, noting that defense counsel had had ample time to prepare for trial. Defendant, who was participating by telephone in the hearing on the motion to continue, expressed frustration at his counsel's inability to be ready for trial, finally telling him that he was fired.

¶23. Three days later, the day before the scheduled jury draw, counsel filed a motion to withdraw, stating that there might be a conflict of interest and that defendant had discharged him because of defendant's unhappiness over his not being ready for trial. He also reported that the defender general had suggested reassigning the case to another attorney whom he had in mind. At the hearing on the motion, the court warned defendant that granting the motion to withdraw would mean further delay. The court asked defendant whether he would rather have a new attorney than go forward with his current attorney. Defendant responded that he had no choice because his current attorney was not prepared to go forward with a trial. The court then granted the motion to withdraw, appointed a new attorney, and ordered a status conference to be held in thirty days. A few days later, the newly assigned counsel reported a conflict of interest, and on March

1, the court appointed a third attorney to represent defendant.

¶24. Nearly three months later, on May 20, defendant filed a pro se motion seeking yet another attorney because of his third attorney's alleged failure to communicate with defendant, to file motions, or to share any discovery material so that defendant could make informed decisions regarding his defense. Defendant claimed in the motion that his third attorney had told him that he (the attorney) could not be diligent because of his heavy case load. A hearing on the motion was held on June 11. Complaining that his attorney had spoken to him on only two occasions for a few minutes since being assigned in March, defendant told the court that he wanted to be brought to trial. For his part, defense counsel stated that he had spoken to defendant at length about trial strategy and that he would make prior deposition testimony available to defendant. He further stated that he had ample time before trial to file a motion in limine and that he would look at whether the habitual-offender charge could be attacked. Near the end of the hearing, defense counsel moved to withdraw from the case, indicating that defendant had threatened him during a break in the proceedings. The court granted the motion to withdraw because of an irreconcilable breakdown in the attorney-client relationship, but warned defendant that he was not entitled to manage every aspect of his defense and that assigning a new attorney would result in further delay. That same day, the court appointed a fourth attorney to represent defendant.

¶25. At a status conference on August 5, defendant's fourth counsel stated that he needed an additional sixty days to prepare for trial because of his heavy case load and because "there seems to be a lot of discovery that [defendant's] prior attorneys never got to for one reason or another." The State asked the court to allow a minimal amount of time for further discovery, noting that defendant was seeking to depose peripheral witnesses for the sole purpose of attacking the victim's character. The court ordered the defense to disclose its additional witnesses by September 16 and indicated that it expected the case to be tried in October. On August 28, defendant wrote a letter to the trial court expressing concern that his new counsel had not contacted his witnesses and had not responded to his calls or letters. Two months later, on October 22, with no intervening action of any sort indicated in the docket, defendant filed a motion to dismiss his counsel because the attorney had not responded to numerous attempts to contact him and had done nothing to prepare for trial.

¶26. A hearing on the motion was scheduled for November 26. The fifth judge to take part in this case presided at the hearing. Defense counsel indicated that he was in the process of getting out of the private practice of criminal defense work and that his contract with the defender general's office had expired in June. He further stated that the defender general had indicated to him that he was going to reassign the case to someone more capable of dealing with it. Without making any findings

regarding the adequacy of the current attorney's representation of defendant, the trial court granted the motion to withdraw and instructed the defender general to assign another counsel-defendant's fifth-as soon as possible.

¶27. A court docket entry indicates that the defender general assigned a new attorney to represent defendant that day, November 26, but at a January 8, 2003 status conference, that attorney told the court that he had been advised in December 2002 only that he might be assigned to the case. Apparently, he had been told to review the case file to see if he had a conflict, but he had not yet received the file. The attorney stated that he would review the case as soon as he was formally assigned to represent defendant. The court ordered the defender general's office to assign a new counsel within fourteen days. On January 15, the defender general advised the court that the fifth counsel had been assigned to the case, and the court issued a formal notice of the assignment a week later. On February 25, the new counsel filed a motion to extend discovery and motion deadlines, stating that he had been out of state the previous three weeks. The court granted the motion, noting the State's acquiescence.

¶28. On April 11, 2003, four and one-half months after the previous attorney's withdrawal and without having done anything in the case, defendant's fifth attorney filed a motion to withdraw, stating that the defender general would be securing new counsel because of modifications in his firm's contract with

the defender general's office.[2] For the following four months, defendant was entirely without counsel. On May 7, defendant filed a pro se motion to dismiss his case in the interests of justice, citing the delay in bringing him to trial. On June 20, the defender general notified the court that it had obtained funding from the Legislature for a serious felony unit and that a new attorney would be hired for the position and could represent defendant commencing on August 1. The new attorney, defendant's sixth, appeared at an August 11 status conference, at which the court scheduled another status conference to give the new attorney a chance to review the case.

¶29. At the next status conference on September 8, the attorney noted a need for further discovery and asked for more time to make sense of the file. The court told defense counsel to review all pending motions and inform the court by November 7 which

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[2] Meanwhile, in April 2003, the State filed an information charging defendant with a violation of an abuse-prevention order and as a habitual offender. A separate docket was opened, and defendant was appointed a different public defender. Citing irreconcilable differences with defendant, the attorney filed a December 2003 motion to withdraw, which the court denied. The case went to trial in February 2004, but defendant's attorney filed another motion to withdraw during the hearing because of defendant's displeasure with his representation. The State did not file a response within the time frame set by the court, and in March 2004 the court granted the motion to withdraw, declared a mistrial, and assigned the matter to the public defender who had recently been assigned to represent defendant on the other pending charges. In July 2005, the State dismissed the violation-of-an-APO charge with prejudice.

ones needed to be ruled on. On November 5, the court accepted a stipulation by defense counsel and the State to extend the November 7 deadline to December 22. At a December 8 status conference, the deadline was extended another sixty days because the files were incomplete and additional documents were needed from the State and previous defense attorneys. A further stipulated extension of the deadline to February 20, 2004 was granted. On February 23, defense counsel filed a motion to dismiss for lack of a speedy trial and in the interests of justice. The trial court denied the motion in an April 19 decision, ruling that much of the delay in bringing defendant to trial was the result of defendant's own actions and that defendant had failed to demonstrate actual prejudice as a result of the pretrial delay. In so ruling, the court also emphasized that defendant's repeated demands for a speedy trial had been made in the absence of a request for trial from counsel or a statement from counsel indicating that they were ready for trial.

¶30. Defendant's trial finally took place in June 2004, after which he was convicted and sentenced to a twelve-to-twenty-year term of incarceration. While the appeal was pending, the State and defendant stipulated that the sentence would be reduced by half if defendant dropped the appeal, but, on remand from this Court, the trial court refused to accept the stipulation.

¶31. Before considering to whom the delay should be attributed and how much weight should be given to this factor, we note that the trial court, in denying

defendant's speedy trial motion, merely listed the number of factors attributable to the delay and then summarily concluded that most of the delay was attributable to defendant. We disagree with this conclusion to the extent that the trial court attributed to defendant the failure of his attorneys to move his case to trial. Examining specific periods of time, we conclude that the period between July and November 2001 should not count against the state because much of the delay during that period was the result of defendant's motion to recuse the trial judge. Further, the period between November 2001 and February 2002 should not count heavily, if at all, against the state because both the prosecution and the court diligently attempted to move the case forward during that time; on the other hand, the case did not move forward because of defense counsel's failure to be ready for trial, not because of defendant's actions. Nor should the period between February and June 2002 count against the state because the trial court was compelled to allow the new assigned counsel to withdraw after defendant threatened him during a break in the proceedings. The record reveals, however, that the attorney did very little to move defendant's case forward during the several months he represented defendant, notwithstanding defendant's persistent demands to be tried. The dissent repeatedly refers to these time periods in support of its position that defendant intentionally sabotaged the criminal proceedings against him, but we do not count them against the state.

¶32. Nevertheless, even assuming that none of the above time periods can be counted against the state, most of the remaining two years can and should be, notwithstanding the State's argument to the contrary. According to the State, the only period of delay that should not be attributed to defendant is an eight-month delay between November 2002 and July 2003 resulting from uncertainty over the assignment of new counsel for defendant. Further, the State contends that even that delay was for "neutral" reasons and thus should not be weighed heavily against the government. In the State's view, the other periods of delay between June 2002 and June 2004 should be attributed to defendant because they resulted from defendant's practice of dismissing attorneys either immediately before trial or before they had an opportunity to review his case. The State describes defendant's dissatisfaction with his attorneys as resulting from their unwillingness to adopt his questionable trial strategy and tactics.

¶33. Our review of the record as detailed above does not comport with this assessment of the facts, which is not based on any trial court findings. While we recognize that defendants may attempt to manipulate the system by creating delay that could conceivably support later speedy-trial claims, the record does not support the State's suggestion that this occurred here, and the district court made no such finding. To the contrary, the record reveals that defendant consistently sought to be tried by competent counsel as quickly as possible. While defendant moved for the removal of several of the attorneys assigned to his case, he did so because

they did not do anything to move his case forward, not because of any disagreements he may have had with them over trial strategy, as the State contends.

¶34. To emphasize this point, we summarize the relevant and material facts of the two-year period between June 2002 and June 2004, keeping in mind that defendant had already been incarcerated at the start of that period for nearly a year on a felony charge stemming from a violation of a pre-trial condition of release. Defendant's fourth attorney, who was assigned in June 2002, stated at an August 2002 status conference that he needed an additional two months to prepare the case, and yet he apparently did little or nothing and finally conceded at a November 2002 status conference that his contract with the defender general had expired and he was giving up criminal defense work. A fifth attorney was not formally assigned until January 2003, and he was allowed to withdraw four and one-half months later without having done anything because of a change in his contract with the defender general's office. At that point, defendant had been incarcerated without a trial for approximately two years, and yet he was entirely without counsel for the next four months until the next assigned counsel took over in August 2003. Despite the already significant delay, the prosecution stipulated to several more continuances before a trial was finally held in June 2004.

¶35. Given these facts, we conclude that a significant portion of the delay in bringing defendant to trial must be attributed to the state, even though

most of the delay was caused by the inability or unwillingness of assigned counsel to move the case forward. The defender general's office is part of the criminal justice system, and ultimately it is the court's responsibility to assure that that system prosecutes defendants in a timely manner that comports with constitutional mandates. While some of the delay in this case certainly is attributable to defendant, a significant portion is attributable to the criminal justice system provided by the state. Although this factor does not weigh heavily against the state because the delay was not the result of a deliberate attempt to hamper the defense, nor do we consider it "neutral," in light of the state's ultimate responsibility to prosecute defendant in a timely manner.

¶36. In arguing that defendant was responsible for most of the delay, the State relies on *State v. Trombly*, where we held that "delay arising out of the relationship between attorney and client must be attributed to the defendant, and omitted from consideration." 148 Vt. 293, 300, 532 A.2d 963, 967 (1987), abrogated on other grounds by *State v. Tahair*, 172 Vt. 101, 105-10, 772 A.2d 1079, 1082-86 (2001). *Trombly* is not comparable to the instant case. In *Trombly*, we excluded from consideration a two-month period occasioned by changes in assigned counsel after the discovery of a conflict of interest. *Id.* at 299, 772 A.2d 1079, 532 A.2d at 967. We also excluded a relatively brief period caused by the defendant discharging his attorney and later accusing the attorney of "conspiring with the state's

attorney against him." *Id.* at 299-300,532 A.2d at 967.

¶37. By contrast, in this case, defendant's trial was delayed for several months, even years, because of the failure of several assigned counsel to do anything to move his case forward. As discussed above, defendant consistently requested that he be tried promptly. He sought the removal of his attorneys only after a significant period of time passed without them doing anything in his case. Thus, not only is the length of the delay significantly different in the two cases, but so are the reasons for the delay. Rather than stemming from ordinary delays occasioned by changes in assigned counsel or problems with an attorney-client relationship caused by the defendant's unfounded conspiracy claims, the delays in this case were caused, for the most part, by the failure of several of defendant's assigned counsel, over an inordinate period of time, to move his case forward.

¶38. The third factor "examines the aggressiveness with which the defendant asserted his right to a speedy trial." *Keith*, 160 Vt. at 268, 628 A.2d at 1254. Here, as revealed by the detailed facts set forth above, defendant repeatedly and adamantly demanded to be tried, and eventually filed motions to dismiss for a lack of a speedy trial, both pro se and through counsel. In past cases, we have emphasized "that a motion to dismiss for lack of a speedy trial is not the equivalent of a demand for an immediate trial." *Id.* In this case, however, from early on and on several occasions, defendant stated unequivocally

that he wanted to be tried as soon as possible. When his attorneys did not move his case forward within a reasonable period of time, he asked the court to replace them with someone who would. While defendant grudgingly consented to continuances to allow his attorneys to prepare his case, he did so only because it was apparent that the attorneys, by their own admission, were not prepared to go forward with a trial. Cf. *Johnson*, 162 Cal.Rptr. 431, 606 P.2d at 744 (holding that an attorney may not waive a defendant's right to a speedy trial to accommodate the interests of other clients rather than benefit the defendant). Just as a defendant cannot be forced to choose between the right to counsel and the right to forego an insanity defense, see *State v. Tribble*, 2005 VT 132, ¶ 33, 179 Vt. 235, 892 A.2d 232 (holding that the trial court erred by treating the defendant's refusal to proceed with an insanity defense as a waiver of his right to counsel), defendant cannot be forced to choose between his right to a speedy trial and his right to effective counsel. As the en banc California Supreme Court stated, a defendant's right to a speedy trial may be denied by the failure of the state to provide "enough public defenders or appointed counsel, so that an indigent [defendant] must choose between the right to a speedy trial and the right to representation by competent counsel." *Johnson*, 162 Cal.Rptr. 431, 606 P.2d at 747-48 ("A defendant deserves not only capable counsel, but counsel, who, barring exceptional circumstances, can defend him without infringing upon his right to a speedy trial.").

¶39. In this case, the record plainly demonstrates that, from early on, defendant aggressively asserted his right to a speedy trial; accordingly, this factor weighs in favor of defendant. In its brief discussion of this third factor, the trial court noted defendant's "repeated requests to proceed to trial, usually without any such demand from his then counsel." Apparently, the court intended this statement to support its weighing the third factor against defendant. For the reasons stated above, we disagree with the court's conclusion.

¶40. Our analysis of the most important and final factor-the extent to which the defendant was prejudiced by the lack of a speedy trial-requires clarification in light of an apparent conflict between federal law and statements made in our past cases. In *State v. Franklin*, 136 Vt. 568, 570-71, 396 A.2d 138, 139 (1978), this Court held that "[t]he passage of over eighteen months from citation to trial, not brought about by the defendant, is so long as to constitute prejudice as a matter of law and a violation of the defendant's constitutional rights." We later overruled *Franklin* to the extent that it established the "use of a per se test" for finding prejudice. *State v. Percy*, 158 Vt. 410, 420, 612 A.2d 1119, 1126 (1992). We emphasized in *Percy* that the balancing test set forth by the United States Supreme Court and adopted by this Court requires a weighing of each of the individual factors to determine whether a defendant's constitutional right to a speedy trial has been denied. *Id.*

¶41. Unfortunately, some of the statements we made in later speedy-trial cases moved toward the opposite extreme, suggesting that an explicit showing of actual prejudice is a prerequisite to finding a speedy-trial violation. It began in *Keith*, 160 Vt. at 270, 628 A.2d at 1255, with this Court noting that "courts are reluctant to resort to the radical remedy of dismissal-the only remedy available to them," and stating "that the constitutional right to a speedy trial is virtually nonexistent when prejudice to the defense is absent." Later, we dropped the "virtually nonexistent" qualifier and cited *Keith* for the proposition that "[w]here there is no prejudice to the defense at trial, a speedy-trial claim cannot prevail." *State v. Turgeon*, 165 Vt. 28, 35, 676 A.2d 339, 343 (1996); see *State v. Crannell*, 170 Vt. 387, 408, 750 A.2d 1002, 1019 (2000) (quoting *Turgeon* for the same proposition).

¶42. We now overrule these cases to the extent that they suggest that demonstrating actual prejudice at trial is a prerequisite in all cases to finding a speedy-trial violation under the United States Constitution. That proposition has been explicitly rejected by the United States Supreme Court. In *Barker*, the Court stated that claims of prejudice "should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect," including "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." 407 U.S. at 532. While acknowledging that prejudice pertaining to the last interest was the

most serious, *id.*, the Court emphasized that none of the four factors, including prejudice, is "either a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial." *Id.* at 533. Rather, the Court cautioned, the related factors "must be considered together with such other circumstances as may be relevant .... in a difficult and sensitive balancing process." *Id.*

¶43. Later, the Court reaffirmed that in Barker it had "expressly rejected the notion that an affirmative demonstration of prejudice was necessary to prove a denial of the constitutional right to a speedy trial." *Moore v. Arizona*, 414 U.S. 25, 26, 94 S.Ct. 188, 38 L.Ed.2d 183 (1973) (per curiam) (holding that the state court committed a "fundamental error" in concluding that a showing of prejudice to the defense at trial was essential to establishing a speedy-trial claim). More recently, the Court has emphasized that "consideration of prejudice is not limited to the specifically demonstrable, and ... [that] affirmative proof of particularized prejudice is not essential to every speedy trial claim." *Doggett*, 505 U.S. at 655. In explaining this principle, the Court noted that "impairment of one's defense is the most difficult form of speedy trial prejudice to prove because time's erosion of exculpatory evidence and testimony 'can rarely be shown.'" *Id.* (citing *Barker*, 407 U.S. at 532). "Thus, we generally have to recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify." *Id.*; see 5 W. LaFave, et al., Criminal Procedure § 18.2(e), at 132

(3d ed.2007) (stating that *Doggett* "makes it clear" that the prejudice factor may favor a defendant even absent any affirmative showing that the delay weakened the ability to raise specific defenses, elicit specific testimony, or produce specific items of evidence).

¶44. With this in mind, we now examine defendant's claims of prejudice in the instant case. Defendant asserts prejudice both in his lengthy pretrial incarceration, in and of itself, and further in the impairment of his defense at trial because of the possible loss of memory of key witnesses. The trial court ruled that defendant failed to demonstrate that his defense had actually been impaired to any degree. With regard to certain witnesses whom defendant claimed may have been able to present exculpatory testimony but for the delay in bringing him to trial, the court ruled that defendant's arguments were too attenuated to demonstrate prejudice.

¶45. In considering the extent to which defendant has demonstrated prejudice, we cannot ignore the significant period of time that he remained incarcerated pending trial. See *Barker*, 407 U.S. at 532-33 (stating the obvious disadvantages of lengthy pretrial incarceration, including the detrimental impact on the individual and the inevitable hindrance in preparing a defense); *Berry*, 2004 WY 81, ¶ 48, 93 P.3d 222 ("Lengthy pre-trial incarceration is one of the factors giving rise to prejudice. It is a separate and distinct factor from pre-trial anxiety...."). "As the length of delay

increases, the presumption of prejudice grows stronger and the degree of actual prejudice that must be shown becomes correspondingly lesser." *Stock*, 2006-NMCA-140, ¶ 38, 140 N.M. 676, 147 P.3d 885. Here, even excluding the delay resulting from defendant's own actions, the length of the delay was egregious, particularly when one considers that defendant was incarcerated and entirely or effectively without counsel for substantial periods of time.

¶46. The State argues that we should give less weight to defendant's lengthy pretrial incarceration because he was also being held on other charges that reduced his chances of being freed on bail pending trial. We agree with defendant that the State's argument is speculative. The charges that the State refers to stemmed from defendant's allegedly driving within 1000 feet of his girlfriend's house in violation of an abuse-prevention order and then asking a friend to tell police that it was him (the friend), and not defendant, who drove by the girlfriend's house. In July 2000, bail was set on the first charge at $5000, with conditions of release. The same amount was set on the second charge in May 2001, concurrent to the first charge. The first charge was initially dismissed without prejudice in May 2001 and eventually dismissed with prejudice, as was the second charge. The State's suggestion that defendant would have been detained for nearly three years irrespective of the delay in this case is pure speculation.

¶47. Defendant also claimed that the excessive delay impeded his ability to mount a defense against the charges, contending that the delay had caused one witness's memory to fade and had prevented him from obtaining the testimony of at least one other witness. Defendant's principal claim concerns a corrections officer who saw defendant shortly after the incident that led to the domestic-assault charge. In a deposition, the officer testified that defendant had showed him a bruise on his back caused by being struck by a baseball bat. The officer further testified that he thought, but was not sure, that defendant had claimed he was struck by his girlfriend. Before trial, the defense represented to the trial court that the officer would testify that, upon admission to the prison facility, defendant showed the officer a red mark across his back and told the officer that his girlfriend had struck him with a baseball bat. The court reserved ruling on the admissibility of the hearsay statements until it heard them. As it turned out, however, the officer was unable to testify by the time of trial because of his physical condition, and the trial court ruled that the hearsay statements were inadmissible. Defendant also claims prejudice in that he was not able to locate one of the police officers who was at the scene of the domestic assault and who allegedly would have been able to provide exculpatory testimony as to what occurred.

¶48. In rejecting defendant's speedy-trial claim, the trial court ruled that defendant's arguments were too attenuated to demonstrate the degree of prejudice necessary to dismiss the charges against

him. We agree with the court that, standing alone, defendant's claims of evidentiary prejudice, although fairly specific, do not appear to be substantial. We caution, however, that even moderately speculative claims of evidentiary prejudice must be given careful consideration because of the difficulty in demonstrating time's erosion of potentially exculpatory testimony. *Middlebrook*, 802 A.2d at 277 (stating that whether a delay has hurt the defense cannot be resolved with mathematical precision, given that evidentiary prejudice is the most difficult form of speedy-trial prejudice to prove); 5 LaFave, supra, § 18.2(e), at 131 (stating that "courts should not be overly demanding with respect to proof of [evidentiary] prejudice").

¶49. In light of the entire circumstances in this case-particularly defendant's lengthy pretrial incarceration, much of which is not attributable to defendant-we conclude that the prejudice factor must be weighed against the state. Cf. *People v. Charles*, 180 A.D.2d 868, 580 N.Y.S.2d 99, 103 (App.Div.1992) (stating that although the defendant's claim of evidentiary prejudice was somewhat speculative, that fact is not significant because of the state's failure to show good cause for the significant delay between the defendant's arrest and trial). Although defendant raises some legitimate, albeit speculative, claims regarding prejudice to his defense, the principal reason that prejudice exists in this case is because of the inordinate delay in prosecuting him while he was incarcerated.

¶50. In sum, each of the four principal *Barker* factors weigh against the State in this case. Accordingly, we are reluctant, but compelled, to exercise the extraordinary remedy of dismissing the charges in a case involving a habitual offender who was convicted of what we consider to be a very serious criminal offense-aggravated domestic assault. See *Barker*, 407 U.S. at 522 (stating that the "amorphous" quality of the constitutional right to a speedy trial leads to "the unsatisfactorily severe" but "only possible remedy" of dismissal of the indictment). We note that although the trial court acted well within its authority and discretion in rejecting the stipulation that would have dismissed this appeal in exchange for reducing defendant's sentence by half, defendant has already served approximately one half of his sentence. We are concerned, however, that the circumstances resulting in the dismissal of the charges in this case could conceivably arise again, perhaps in a case involving a murder or another serious felony.

¶51. We within the criminal justice system, and particularly the judiciary, have the duty and responsibility to assure that this does not happen. See American Bar Association, Standards for Criminal Justice, Standard 12-1.2, commentary at 12-9 (2d ed. 1986) ("The trial court should be vested with absolute (not merely ultimate) responsibility over the trial calendar."). To the extent that what happened in this case is not an aberration but rather the result of a lack of funding to support the criminal justice system in this state, we encourage the Legislature to examine any unfulfilled needs and

address the problem. See generally Gideon's Broken Promise: America's Continuing Quest for Equal Justice, A Report on the American Bar Association's Hearings on the Right to Counsel in Criminal Proceedings (2004) (concluding that thousands of individuals are processed through America's courts every year with either no lawyer or lawyers who do not have the time, resources, or inclination to provide effective representation).

The district court's decision denying defendant's motion to dismiss for lack of a speedy trial is reversed and the matter is remanded to the district court with directions to set aside the convictions, vacate the sentence, and dismiss with prejudice the charges against defendant in this criminal case.

¶52. BURGESS, J., dissenting.

Today the majority frees a convicted woman beater and habitual offender, not because of any infirmity in the evidence or unfair prejudice in the trial by which a jury found him guilty, but because the defendant delayed the proceedings for almost twenty-two months. Despite repeated early efforts by the prosecution and the court to commence trial, defendant engaged in a pattern of disqualifying his lawyers and monkey-wrenching his scheduled trials in this and related cases. The defender general's inability to secure additional lawyers in the middle of defendant's postponement may have delayed this matter for another ten to fourteen months, but this gap in assigned counsel resulted in no demonstrated prejudice to defendant or his case. Nor is the

majority's release of defendant compelled under the Speedy Trial Clause by any other factor dictated by the United States Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). Because the majority vacates the conviction and dismisses the charge when the law does not require it, I respectfully dissent.

¶53. The majority insists that it relies upon the "undisputed record" in this case, ante, 5, but cannot point to any fact in that record, apart from defendant's unproven assertions, to support defendant's claim that his own repeated postponements of trial were due to unpreparedness, caseload, or lack of diligence on the part of his assigned counsel. Nor can the majority point to any fact in that undisputed record justifying defendant's forced disqualification of his first two lawyers and his election to skip two scheduled trials. From that same record, the majority cannot cite a single example of undue prejudice to defendant, personally or to his defense, violative of his speedy trial rights as defined by *Barker*. Remand is not, as suggested by the majority, a pretext to affirm the conviction; rather, it is necessary to establish whether the facts required by *Barker*, and missing here, exist to reverse on speedy trial grounds.

¶54. The majority posits that the trial court could have exerted more control over its docket by denying new counsel when defendant disqualified his court-appointed lawyers by manufacturing unnecessary ethical conflicts. *Ante*, 5. If the majority is serious on this point, then the trial court and the defender

general had no further obligation to secure a replacement lawyer after defendant disqualified his first and second assigned counsel by insisting on a position that one could not ethically represent and by threatening the other. Defendant could have demanded immediate trial or invoked his right to self-representation at any time, but did neither. Instead, defendant insisted on the assistance of counsel to which he was no longer entitled. That he purports now to be dissatisfied with the time it took to overcome his sabotage is hardly of constitutional import and certainly no violation of the Sixth Amendment.

¶55. The majority's contrary assertion notwithstanding, the lion's share of delay in this case is attributable to defendant, and not to the state. Nearly a year passed without trial between arraignment on July 30, 2001 and the appointment of a third counsel in June 2002, on account of defendant's requests for continuances, his motions to replace counsel on the eve of one trial and several months before his anticipated second trial date, his additional motions practice, and defendant's avoidance of trial by his tactic of forcing counsel to resign. Defendant threatened his second lawyer, leading him to withdraw from the case, and conversed with his first lawyer in such a way as to preclude that counsel's zealous representation. The final eleven months before trial is entirely attributable to defendant as time during which his last assigned counsel requested repeated extensions, prepared for trial and filed motions-none of which

was challenged by defendant as unreasonable or less than diligent.

¶56. Defendant's claims of ineffective assistance of counsel to justify dismissal of his lawyers were not substantiated by the trial court. Somehow, now, these same claims are accepted by the majority at face value without supporting evidence.[3] It is not for this appellate court, but for the trial court, to make evidentiary findings regarding post-trial claims that incompetent counsel led to an undue delay of trial. See *State v. Boyea*, 171 Vt. 401, 427, 765 A.2d 862, 880 (2001) (Johnson, J., dissenting) ("[I]t is not our job to supplement the record.... This constraint is inherent in the nature of an appellate court; we must bow to the controlling force of the record and consider only those facts that were established below.") (quotations omitted). The trial court never reached that particular issue when addressing defendant's motions to dismiss for lack of speedy trial, basing its decision instead on defendant's own contributions to the delay and the lack of any actual prejudice to the defense from the delay. The

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[3] This error is reminiscent of a similar situation in *State v. Cadorette*, where a majority of this Court inferred prejudice, without any evidence, from the defendant's unproven claim of ineffective assistance of counsel. 2003 VT 13, 11-15, 175 Vt. 268, 826 A.2d 101 (Morse, J., dissenting) (pointing out that "on this record we have no way of knowing what happened during the course of the prosecution and defense," that "[t]he Court assumes defendant was woefully defended based on colloquies outside the context of a fact-finding hearing," and that "this Court has jumped the gun and denied the State an attempt to defend against the ineffective assistance of counsel claims alleged by defendant").

majority's further assumption that more than two years of delay is attributable to ineffective representation is plainly contradicted by the record. When the trial court did consider whether counsel was ready for trial in a pre-trial motion, it rejected defendant's claims that his lawyer was unprep: ·ed. That ruling is not challenged. Defendant's subsequent complaint-that assigned counsel were too overworked to adequately represent him-was found by the court to be unsupported by the evidence. That determination is not challenged. No ruling was reached on defendant's claim that his second lawyer was ineffective, because defendant threatened that lawyer, leading him to withdraw from the case, when defendant could not prove his allegations of inattention and incompetence. The majority's undisputed record shows that defendant demonstrated no professional inattention in the work of his first two lawyers. The majority nevertheless assumes nonfeasance, despite the trial court's unchallenged conclusion to the contrary.

¶57. In the course of its appellate fact finding, the majority omits or ignores several matters relevant to its concern that either the court or the defender general neglected defendant's legal welfare. The immediate case was one of three related prosecutions pending against defendant and involving the same complainant-one older felony, and a newer habitual-offender felony filed in April 2003. In its May 12, 2003 entry order in this and all pending cases against defendant, the trial court acknowledged difficulties in finding counsel to assign to the instant case but, taking advantage of the fact

that the local public defender was not conflicted off the new, habitual-offender felony, assigned the public defender to that case and prioritized it to be tried first. Thus, despite unavailable counsel and lack of progress in the instant case during 2003, the court strove to bring defendant to trial on the related docket. In the same entry order, the trial court also noted that defendant was

> held for lack of bail in this [the new habitual-offender] docket as well as the others. Should his bail status change so that he is being held solely on those cases for which the defender general has yet to provide representation, the court will immediately schedule a bail review hearing in those cases.

(Emphasis added). Defendant reported no change in bail status to the court.

¶58. But for defendant's repeated maneuvers to dismiss his lawyers and avoid trial through the first eleven months following arraignment, the difficulty in finding additional counsel would not have arisen. At least twice in this case, and in two related cases, defendant tried to avoid scheduled trials by claiming without success that his lawyers were incompetent, unprepared or overworked.[4] Failing in those efforts,

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[4] The majority's expansion of the record to render judgment on defendant's bare allegations, rather than on evidence presented or findings made below, should welcome consideration of relevant docket entries and transcripts from defendant's related cases covered by the May 12, 2003 entry order in this

defendant next undertook to disqualify his counsel by threatening one lawyer, and, as in yet another related case, by putting his other assigned counsel in an ethical bind to preclude or impede continued representation.[5]

¶59. As indicated by the majority, defendant's third and fourth counsel appeared to accomplish little or nothing on his behalf over the next eight months, and, in the interims following their termination, defendant was twice without counsel for a total of almost six months. Neither defendant nor the defender general would have faced difficulty in finding available and effective counsel, however, had defendant not contrived to disqualify counsel and delay trial in the first place. That defendant did not want trial is further reflected by his similar

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case. That the records of the companion cases were not incorporated into the appellate presentations here is no surprise given that the parties had no reason, then, to expect fact finding by this Court on the merits of defendant's factual claims. The majority opens the door. The companion cases were referred to by the parties as influencing bail and impacting trial in this case, so let us examine the total circumstances of delay as called for by *Barker*. Examination of that record only illustrates that the majority jumps to its assumption of government neglect of an accused anxious for trial without the benefit of evidence and without the context of what was actually afoot in the trial court at the time.

[5] As argued by the State when contesting defendant's efforts to discharge his second assigned counsel in this case, the older felony docket presented still three other incidents of defendant's pattern of seeking dismissal of counsel or continuances when confronted with trial dates.

obstruction in the newer habitual-offender case when, again faced with an imminent trial date eighteen months later, defendant first attempted to have his lawyer dismissed as overworked and unprepared, and, failing in that ploy, then forced a mistrial and disqualification of counsel by ensnaring his lawyer in some fraud upon the court.

¶60. Also missing from the majority's narration is defendant's express waiver of speedy-trial rights in February 2002, after declining two opportunities to go to trial. The majority intones that defense counsel should not be forced to trial without reasonable preparation, but there is no evidence or findings to support defendant's claim that he had to forfeit trial rather than proceed unprepared. The trial court rejected his lawyer's argument that documents and new witnesses still to be sought were necessary to the defense. This judge's decision has not been challenged.

¶61. After his waiver, defendant made no demand for speedy trial. Nevertheless, the majority recites several times, but erroneously, that defendant "repeatedly and adamantly demanded to be tried." *Ante*, ¶ 38, 765 A.2d 862. Defendant is fond of claiming that he repeatedly asserted his right to trial, but the record shows that he did not. Instead, defendant filed serial motions to dismiss the case or dismiss his counsel, but never actually demanded a prompt trial. It is long settled that motions to dismiss for lack of speedy trial are no substitute for demanding an expedited trial. *State v. Keith*, 160 Vt. 257, 268, 628 A.2d 1247, 1254 (1993); *State v.*

French, 152 Vt. 72, 77, 564 A.2d 1058, 1061 (1989); *State v. Unwin*, 139 Vt. 186, 196, 424 A.2d 251, 257 (1981). This is because defendants, like this defendant, could otherwise move for dismissal without being themselves prepared for trial. *Unwin*, 139 Vt. at 196, 424 A.2d at 257 (recognizing that "[a] demand for trial would require that the defense be prepared").

¶62. Denying one of these later motions to dismiss, the trial court noted that

> [d]efendant's current counsel has not demanded trial nor indicated that she is ready for trial.... This court remains ready to schedule jury draw and trial within a reasonable time of ... counsel's demand for same.

Despite this invitation, no such request for trial was forthcoming. This finding also remains unchallenged.

¶63. Similarly, the majority's concern that delay in this case may have been due to inadequate public-defender resources is unsupported by the record. While the defender general obviously had trouble finding counsel during the fourteen months following defendant's threat to his second lawyer, this difficulty appeared no more attributable to lack of resources than to ordinary conflicts of interest, attorney retirement, contract modification, and defendant's own misconduct. None of the delay was shown to be caseload related. Defendant claimed so,

or said his lawyers claimed as much, but proved none of it. Two lawyers were disqualified due to conflicts, while defendant forced two others off the case by his own behavior. Another assigned counsel quit the practice of criminal law and yet another withdrew due to a contract change. Cases cited by the majority addressing speedy-trial violations arising from overcrowded courts or overburdened public defenders are not particularly enlightening on this record that shows that defendant deliberately passed up two different trial dates, squandered another, and forced the discharge of three prepared court-appointed lawyers.

The *Barker* Test

¶64. To determine a speedy trial violation, we must consider and balance the four factors laid out by the Supreme Court in *Barker*: (1) the length of the delay; (2) reasons for the delay; (3) whether defendant asserted his rights; and (4) prejudice to defendant. 407 U.S. at 530. If any rule governs speedy-trial analysis, it is that there is no absolute standard. "[T]he right to speedy trial is a more vague concept than other procedural rights. It is, for example, impossible to determine with precision when the right has been denied." *Id.* at 521. Thus, we are required to approach this case on an ad hoc basis as to the consequence of delay upon the constitutional interests behind the right to speedy trial: prevention of oppressive pretrial detention, minimization of pretrial anxiety of the accused and limitation of the impairment of the defense. *Id.* at 532. "Of these, the most serious is the last [factor], because the inability

of a defendant adequately to prepare his case skews the fairness of the entire system." *Id.*

Length of Delay

¶65. This was not a case where the court acceded to stagnation. Knowing that two of defendant's other cases had slowed due to problems with available lawyers, the court advanced defendant to trial in the parallel habitual-offender felony case that was not mired in conflicts with counsel. Since the shortage of lawyers was, in large part, precipitated by defendant, and it was unlikely that defendant would have been preparing for two life-penalty felony trials simultaneously had he but one counsel, the hiatus here while counsel prepared for trial in the other serious case was not material.

¶66. Delay of fourteen months is presumptively prejudicial, but not grounds to dismiss per se. An even longer delay would not entitle defendant to the majority's "get-out-of-jail-free" card under the Speedy Trial Clause. See *Barker*, 407 U.S. at 534 (holding that five-year delay attributable to prosecution, including ten months of incarceration, was extraordinary, but did not justify writ of habeas corpus for lack of speedy trial when defendant acquiesced to three years of delay without prejudice); see also *Moore v. Arizona*, 414 U.S. 25, 28, 94 S.Ct. 188, 38 L.Ed.2d 183 (1973) (holding that a three year delay warranted remand for an assessment, under *Barker*); *State v. Percy*, 158 Vt. 410, 420, 612 A.2d 1119, 1126 (1992) (rejecting claim of per se speedy-trial violation where trial court inaction for eleven

months contributed to twenty-eight months passing between reversal of original conviction and retrial). "[P]resumptive prejudice cannot alone carry a Sixth Amendment claim without regard to the other *Barker* criteria...." *Doggett v. United States*, 505 U.S. 647, 656, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992). Given defendant's repeated efforts to postpone trial in this case for almost two years, the absence of prejudice, and the court's countervailing efforts to get to trial in the companion case only to be sabotaged by defendant, the lengthy delay attributable to the defender general carries little, if any, weight against the state.

Cause of Delay

¶67. Inattention to defendant's right to speedy trial "is obviously to be weighed more lightly than a deliberate intent to harm the accused's defense...." *Id.* at 657. It was defendant who alienated and disqualified one lawyer on the brink of trial in this case, and again alienated and disqualified another lawyer who was ready for trial four months later. If defendant had not so deliberately delayed the instant matter, the defender general would not have been faced with finding yet another counsel to assign. Having twice duly provided defendant with counsel and opportunity to proceed to trial, the weight of subsequent delay in finding another counsel falls only lightly on the state. Already a light burden due to mere negligence, as opposed to design, the weight against the state is slighter still considering defendant's repeated instigation of delay.

Assertion of Right

¶68. Defendant's failure to demand trial was no waiver of speedy trial indefinitely, but is still a factor in evaluating his claim of deprivation. *Barker*, 407 U.S. at 528. Given the trial court's unassailed finding that defendant made no such assertion, this factor cannot weigh in his favor. Defendant's consistent actions to dismiss his lawyers and delay trial belie his purported interest in either. "It is incumbent on the defendant to assert his right to speedy trial in order to obtain reversal here as a result of delay." *State v. Roy*, 151 Vt. 17, 37, 557 A.2d 884, 896 (1989) (noting *Barker* Court's emphasis that "'failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial' ") (quoting *Barker*, 407 U.S. at 532)). Defendant's demonstrated disinterest in speedy trial weighs against him.

Prejudice

¶69. The presumptive prejudice of the delay attributable to the state is not conclusive, but rebuttable. *Doggett*, 505 U.S. at 658 (noting that where the presumed prejudice "is neither extenuated, as by the defendant's acquiescence, ... nor persuasively rebutted, the defendant is entitled to relief"). Except for claiming that the memory of one witness was compromised and the address of another witness was lost by the passage of time, defendant failed to proffer evidence that the Sixth Amendment's protection against oppressive

confinement, pretrial anxiety or impairment of the defense were prejudiced by delay in this case.

¶70. The trial court correctly rejected the impaired-defense claim as unfounded. The testimony that would have resulted from the allegedly failing memory of one witness would have been excluded on evidentiary grounds unrelated to delay, while defendant's bald assertion, that unspecified "exculpatory information" was lost when the witness's address was lost, lacked any basis in the record. On appeal, defendant complains about these rulings, but offers no explanation as to why the court was wrong on the facts or the law. Following the majority's admonition that "even moderately speculative claims of evidentiary prejudice must be given careful consideration," *ante*, 48, the trial court's denial of this claim is still supported by the record. Recollected or not, the statement sought from the witness was inadmissible hearsay. The claimed, but never identified, exculpatory evidence was not moderately speculative, but purely speculative.

¶71. It is not at all evident how the defender general's fourteen-month delay, sandwiched in the middle of defendant's twenty-two month prolongment of this case, was otherwise prejudicial. We are concerned that "[i]nordinate delay ... may seriously interfere with ... defendant's liberty ... and ... may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends," *Moore*, 414 U.S. at 27 (quotation

omitted), but none of these fears were realized here. We know that defendant twice preferred continued incarceration to an opportunity for trial and acquittal more than twenty-four months earlier. Defendant argued no greater anxiety or oppression in his jail time during the delays attributable to the defender general than from the eleven months of jail time wasted by defendant in forcing his lawyers off the case, or the eleven months of jail time accumulated while his new attorney requested extensions and prepared for trial. Considering defendant's contribution to the extra delay and his demonstrated lack of interest in speedy trial, any extra incarceration attendant to difficulty in securing replacement counsel seems not so oppressive, and carries little weight against the state.

¶72. The delay attributable to the defender general proved simply immaterial to some of defendant's pretrial detention. Commencing April 11, 2003, defendant was held, regardless of any delay, for over twenty-one months for lack of $6,000 bail in the companion cases. Thus, the delay attributable to the defender general in this case from April 11 until appearance of new counsel on August 1, 2003, had nothing to do with his continued incarceration during that time, reducing the potential prejudice of delay-related pretrial detention to ten months at worst. In contrast, absent other significant attending prejudice, four years of delay, including ten months pretrial detention, was of insufficient weight to warrant release of a convicted defendant in *Barker*. 407 U.S. at 534.

¶73. The majority too easily dismisses as speculative the State's point that defendant would have remained incarcerated on the other charges regardless of the delay here. Defendant's ongoing detention regardless of the delay attributable to the defender general was not speculative, but certain. Defendant turned down the trial court's invitation for reconsideration of its hold-without-bail order. Unable to make the modest bail imposed in his other pending dockets, the issue of defendant's continued pretrial detention after assignment of the new counsel was moot. In any event, ten months of pretrial detention attributable to delay cannot, by itself, be reason to reverse on Sixth Amendment grounds. *Id.*

¶74. Nor was financial hardship, domestic disruption or public disgrace at risk for defendant. According to his public defender application, defendant was unemployed and without significant assets at the time of his arrest. Court records show that defendant's former domestic partner, the victim in the pending prosecutions, secured multiple relief-from-abuse orders against him prohibiting defendant from contacting her and limiting parent-child contact. Defendant's chronic criminality was already a matter of public record showing fourteen prior convictions, including felonies for obstructing justice, concealing stolen property and, at age thirty-one, sexual assault of a minor, so that defendant's public ignominy was achieved well before, and was hardly exacerbated by, any delay in this case.

¶75. Defendant failed to prove the prejudice claimed, and otherwise failed to allege any particular prejudice, real or possible, resulting from delay in this case. The majority properly clarifies our caselaw to acknowledge that actual impairment of the defense is not the ultimate test for a Sixth Amendment violation. See *Moore*, 414 U.S. at 26-27 (recognizing that actionable "prejudice to a defendant caused by delay ... is not confined to the possible prejudice to his defense"). Prejudice can arise from unnecessary incarceration, disruption of finances or family, shame, or anxiety. *Id.* at 27. Nevertheless, and however characterized, "[a] showing of prejudice is required to establish a violation of the Sixth Amendment Speedy Trial Clause, and that necessary ingredient is entirely missing here." *Reed v. Farley*, 512 U.S. 339, 353, 114 S.Ct. 2291, 129 L.Ed.2d 277 (1994) (emphasis added).

¶76. Thus, none of the speedy-trial factors mandated for our review by *Barker* require reversal of this conviction and dismissal of the charge against defendant. The length of delay in securing effective counsel was unfortunate, but not per se prejudicial. The government twice fulfilled its obligation to secure representation for defendant and to proceed to a timely trial before defendant created further delay in his case. But for defendant's repeated tactics to disqualify his lawyers and delay trial there would have been no difficulty in finding substitute counsel, so the defender general was not the primary cause of delay. Defendant neither proved nor actually pled any imposition on reputation,

relationship, or peace of mind. Even assuming that defendant sustained natural anxiety or disruption from being charged and imprisoned pending trial in this case, it was not enough to deter defendant from twice manufacturing delay of trial to pass up the opportunity for acquittal and release in this matter. Nor does defendant distinguish the burdens of incarceration in this case from the same burdens presumably arising from being simultaneously held for lack of bail in the companion cases. Most significantly, under *Barker*, this delay caused no impairment to the defense. 407 U.S. at 533 (discussing the prevention of impairment to the defense as the "most serious" interest protected by the speedy trial clause). Accordingly, the factor of prejudicial impact, in any of its various forms, carries no weight against the state.

¶77. Wanting the case dismissed, defendant just as clearly did not actually want a speedy trial. Defendant waived and then failed to assert his right to speedy trial, while his consistent efforts to avoid trials confirmed his disinterest in going to trial. "More important than the absence of prejudice, is the fact that [defendant] did not want a speedy trial." *Id.* at 534.

¶78. The majority glosses over the foregoing facts and prefers to grant relief based on as yet unproven allegations of prejudice caused by neglectful delay in assigning counsel. Based on the record, defendant's complaints are unsupported at best, and contrary to the evidence at worst. If the attorneys forced off the case by defendant were incompetent, ineffective, or

unprepared, or if defendant sustained any prejudice from delay, we cannot know from the record before us. Relying on our precedent, now overturned, see *ante*, ¶¶ 40-42, the trial court ended its post-trial inquiry once it was evident that defendant failed to assert his speedy-trial rights and that, whatever its length and cause, the delay had no actual adverse impact to the defense. The full spectrum of balancing length of delay, cause of delay and other potential prejudices as required by *Barker*, was not completed below.

¶79. The record supports the conclusion that defendant is not entitled to relief. The court's initial ruling that trial would proceed over defendant's protestations of unpreparedness is not challenged. In his other motions to dismiss below, and in this appeal, defendant repeats his lament about unprepared lawyers, but nowhere specifies how the trial court erred in its rejection of this claim. On the record before us, even without considering defendant's similar obstructions of trial in his companion dockets, defendant failed to demonstrate any of the prejudices upon which *Barker* would require dismissal for lack of speedy trial. On the same record, defendant failed to show that the length of delay was more egregious than much longer delays deemed not to require dismissal under *Barker*. On that record, defendant failed to tip the remaining *Barker* factors in his favor; he did not show why his own contributions to the delay were outweighed by the state's, or that he asserted his speedy-trial right-or that he even wanted a speedy

trial-all as required by *Barker* as a precondition to relief.

¶80. The most significant facts found by the majority-that the state, rather than defendant, was responsible for two years of delay, that defendant had no choice but to disrupt his trial schedule because his lawyers were unprepared, and that he repeatedly asserted his right to speedy trial and was prejudiced as a result of delay-were neither found below nor supported by the record here. If the trial court's denial of the motion to dismiss cannot be sustained by the *Barker* factors on the available record, although I believe it can be, the case cannot be dismissed without the necessary *Barker* findings of prejudice, cause of delay, and whether defendant indeed sought and was denied a speedy trial.

¶81. Finally, before affording defendant release and dismissal of the charges based on assumptions premised on nothing but his purported version of events, the State should have an opportunity for rebuttal. Otherwise, we surrender control to those more invested in avoiding jury verdicts than in vindicating the right to speedy trial. As the Supreme Court recognized in *Barker*, speedy trial is often not a defendant's friend. 407 U.S. at 521 (observing that "[d]elay is not an uncommon defense tactic" as "witnesses ... become unavailable or their memories ... fade"). The majority's procession to judgment without the evidence necessary to actually confirm its perception that the *Barker* factors preponderate against the state, or its assumption, against the evidence, that delay prejudiced the

defendant, can only encourage dilatory tactics by jailhouse lawyers and others interested in subverting the trial court.

¶82. If the majority finds the trial court's *Barker* analysis deficient, the proper remedy is to remand for the necessary evidentiary proceedings where privilege can be waived and the readiness and tactics of defendant's attorneys, as well as defendant's tactics and his intentions regarding speedy trial, can be more fully explored. Otherwise, while the record supports rejection of the claimed speedy-trial violation under *Barker*, there are insufficient facts or evidence in the record to support the majority's assumption that defendant should be freed. Since no Sixth Amendment grounds presently justify endangering the public by the unnecessary discharge of this habitual felon, I dissent, and am authorized to state that Chief Justice Reiber joins in this dissent.

STATE OF VERMONT
BENNINGTON COUNTY, ss.

State of Vermont	
Plaintiff,	
v.	
Michael Brillon,	
Defendant.	

BENNINGTON
DISTRICT COURT
DOCKET NO. 957-7-01 Bncr

ORDER ON DEFENDANT'S MOTION TO DISMISS FOR DENIAL OF SPEEDY TRIAL AND IN THE INTEREST OF JUSTICE

Introduction

Defendant Michael Brillon moves the Court to dismiss the State's charges against him under V.R.Cr.P. 48(b)(1) & (2), arguing that he has been denied a speedy trial and that dismissal is warranted in the interest of justice. Defendant's motion argues that the substantial delay in conducting his trial has resulted in prejudice, and that dismissal is warranted as a result of the prejudice brought about by the inability of certain

witnesses to testify; witnesses that Defendant asserts would have, or could have, provided exculpatory information relating to his claims of self defense. The Court will address both components of Defendant's motion under V.R.Cr.P 48(b) in turn. This order will also address Defendant's supplemental arguments to this motion, filed with the Court on December 30, 2004.

The present motion under V.R.Cr.P 48 is Defendant's renewed motion, raising arguments under both prongs of V.R.Cr.P. 48, and for the reasons that follow Defendant's renewed motion is **DENIED**.

Standard

Motion to Dismiss for Denial of a Speedy Trial

A defendant's right to a speedy trial is a right guaranteed by the United States Constitution. U.S. Const. amend. VI; Barker v. Wingo, 407 U.S. 514 (1972). The Vermont Supreme Court has adopted the factors outlined by the Court in Barker. State v. Roy, 151 Vt. 17, 37 (1989); State v. Keith, 160 Vt. 257 (1993). The factors to be considered by the Court in addressing a defendant's claims that he or she was denied a speedy trial are as follows: 1) the length of the delay, 2) the reason for the delay, 3) the defendant's efforts in obtaining a speedy trial, and 4) the prejudice to the defendant. Id. at 267 (citing Barker, 407 U.S. at 530, 532).

Motion to Dismiss in the Interest of Justice

The Court reviews a motion to dismiss in the interest of justice under V.R.Cr.P. 48(b)(2) by assessing the following factors: 1) the seriousness and circumstances of the charged offense, 2) the resulting harm from the offense, 3) the length of pretrial incarceration, 4) the impact of a dismissal on public confidence in the judicial system, and 5) the attitude of the victim or complainant in the case. State v. Prior, 174 Vt. 49, 52 (2002) (citing State v. Sauve, 164 Vt. 134 (1995)). The trial court's balancing of the factors is Aan exercise of its broad discretion. Id.

Discussion

Defendant Michael Brillon was convicted by jury of second degree aggravated domestic assault under 13 V.S.A. 1044(a)(1), the charge being aggravated by Defendant's violation of a condition of release imposed as the result of a prior incident. Defendant argues that as a result of his significant pre-trial detention and the alleged improper conduct of the State's attorneys certain witnesses were either entirely unavailable, unavailable for thorough examination, or had forgotten important details of the events of Defendant's assault. Defendant asserts that these witnesses, had they been entirely available, could have provided potentially exculpatory information and that he was prejudiced by their unavailability. Because Defendant argues for dismissal under both prongs of V.R.Cr.P 48, each

of Defendant's arguments will be addressed separately.

Motion to Dismiss for Denial of a Speedy Trial

As this Court concluded in its order of April 19, 2004, Defendant encountered enough delay prior to trial to trigger further analysis. (Entry Order - Def.'s Mot. to Dismiss for Lack of Speedy Trial and in the Interests of Justice, April 19, 2004.) In its order the Court provided some background as to why Defendant experienced the delay and concluded that despite the delay, Defendant had not experienced any actual prejudice at that time. Id. at 2.

1) Witness Phillips

In his renewed motion, Defendant claims prejudice as a result of the Court's ruling that Roger Phillips' deposition testimony was inadmissible at trial. (Trial Tr., June 17, 2004, at 4-27.) Phillips was on duty at Marble Valley Correctional Facility the morning Defendant arrived there following the present offense. Defendant claims prejudice here arguing that due to the trial delay, Phillips memory had faded to the point where his lack of memory precluded the admission of the testimony contained in Phillips' deposition under V.R.E. 803(4).

During trial, the Court ruled that in order for Defendant's statements to Phillips to be admissible under V.R.E. 803(4), there must be testimony that Defendant was asking Phillips for medical help, and conveyed this information (about who hit him) to Phillips in the course of seeking treatment. The

Court, given that Phillips was the only conduit between Defendant and any such treatment, was willing to consider the statements under 803(4) had Phillips stated with some certainty that Defendant actually asked for such treatment, and that the statement concerning who hit him was made during the course of seeking the treatment. Phillips' deposition revealed no such communication, and Defendant could not proffer anything beyond what was in the deposition. Defendant claims error arguing that the trial delay resulted in Phillips' inability to recall if Defendant asked for medical treatment, thus precluding Phillips' trial testimony by phone or the use of his deposition testimony concerning Defendant's limited statements as to who hit him.

Defendant's argument is too attenuated to demonstrate the prejudice necessary for the Court to dismiss the charges against Defendant. Moreover, Phillips' testimony was preserved in a deposition where Defendant's prior counsel was present. Had Defendant made the required evidentiary showing under 803(4) the Court would have considered the statements' admission. See State v. French, 152 Vt. 72, 77-78 (1989) (potential for prejudice minimized when witness testimony preserved in depositions). However, the Court is unwilling to say that the trial delay alone caused Phillips' testimony to be inadmissible.

Defendant also argued that Phillips' deposition testimony regarding Defendant's statements was admissible under V.R.E. 803(2) and (3), and that Phillips' observations as to a red mark

on Defendant's back were also admissible. The Court ruled that Phillips' observations of Defendant's injury, without any other evidence of self defense or that Defendant had been hit by Michelle Tatro, were simply not relevant. See V.R.E. 402 ([e]vidence which is not relevant is not admissible); see generally V.R.E. 104(a).

The Court also ruled that Defendant's statements to Phillips were not admissible under V.R.E. 803(2), the excited utterance hearsay exception. The facts surrounding Defendant's communication with Phillips simply could not meet the requirements in 803(2) that Defendant's statements related to a startling event and were made under the stress of that event. V.R.E. 803(2). Defendant made his statements to Phillips a substantial period of time after the assault during which Defendant asserts he was hit, and the circumstances surrounding the statements indicate none of the context required by the Rule.

Lastly, Defendant argued that his statements to Phillips could be admitted under V.R.E. 803(3). The Court agreed that if relevant, Defendant's statements regarding being in pain or having a certain medical condition would be admissible. However, Defendant's statements as to how he received the injury would not have been admissible given 803(3)'s prohibition of Aa statement of memory or belief to prove the fact remembered or believed. V.R.E. 803(3).

Despite Defendant's argument that the delay in his trial caused the deficiencies with witness

Phillips, a review of the trial transcript reveals that Phillips' problems as a witness were evidentiary in nature, rather than caused by the delay Defendant experienced.

2) Witnesses Knapp and Kitteredge

Defendant also claims prejudice in the State's alleged failure to provide complete addresses for witnesses Clayton Knapp and Diana Kitteredge, both of whom were responding officers to Defendant's domestic assault. This, Defendant argues, led to his inability to thoroughly examine these witnesses.

With respect to Kitteredge, Defendant argues that because the State did not have an address for Kitteredge and Defendant could not locate Kitteredge through his own efforts, this constituted prejudice because Kitteredge's deposition contained Apotentially exculpatory evidence. (Def.'s Renewed Mot. to Dismiss for Denial of Speedy Trial and in the Interest of Justice, at 3.) In order to show prejudice, Defendant must do more than make a bare assertion that the witness may have had exculpatory information. See Keith, 160 Vt. at 269 (no denial of right to speedy trial where defendant made no specific claims of prejudice). By Defendant's own admission, Defendant was unable to locate Kitteredge after attempting to do so, and thus Kitteredge's unavailability cannot be entirely attributed to any failure by the State.

With respect to Clayton Knapp, Defendant argues that the State acted improperly in

withholding Knapp's contact information from the Defendant. Defendant argues that this led to Knapp's unavailability as a defense witness because Knapp refused service of Defendant's subpoena. (Def.'s Renewed Mot. to Dismiss for Denial of Speedy Trial and in the Interest of Justice, at 3.) Defendant argues that as a result of Knapp's unavailability as a defense witness, Defendant was unable to fully examine Knapp on direct, and was precluded from thorough examination on cross due to the State's limited scope on direct examination. Defendant argues specifically that he was not permitted to examine Knapp with regard to his observations of Tatro's injuries. Defendant suggests that these observations were critical to his case. However, Defendant proffers no specific evidence about which Knapp would testify other than to say that he was not able to question Knapp as to his observations of Tatro's injuries. Here, Defendant has not demonstrated that his inability to directly examine Knapp was prejudicial.

Additionally, Defendant argues that he was deprived of the opportunity to inquire into discrepancies between Knapp's deposition and trial testimony. The difference between the two appears to be limited to the specificity with which Knapp recounted Defendant's derogatory statements to him at the scene of the assault. In his deposition, Knapp stated that he did not recall what Defendant had said to him at the scene. (Knapp Dep., at 28.) In his trial testimony, Knapp recounts with more specificity the exchange between Defendant and himself. (Trial Tr., June 15, 2004, at 230.) The Court fails to see how this discrepancy bears on any

prejudice suffered by Defendant other than possible impeachment of Knapp's credibility as to a collateral issue; the arguably inconsistent testimony is simply not probative as to Defendant's guilt in this case.

In its reply to Defendant's motion, the State acknowledges that it erred in failing to provide contact information. (See State's Supplemental Opposition to Def.'s Mot. for a New Trial/Judgment of Acquittal with Exhibits.) Regardless of the circumstances that gave rise to this situation, Knapp's unavailability resulted in no prejudice to Defendant. Moreover, Knapp's apparent refusal to comply with Defendant's subpoena cannot be attributed to any actions by the State, and such refusal could have been addressed through the Court. See V.R.Cr.P. 17(g) (Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued.)

Defendant's Claim of Newly Discovered Evidence

Defendant also supplements his motion with argument stemming from what Defendant describes as newly discovered evidence demonstrating that Michelle Tatro did not want to press charges against Defendant. Defendant argues that this undermines the purpose for which the Court imposed its condition of release on Defendant, and which Defendant violated allowing the State to charge him with second degree aggravated domestic assault. (See Def.'s Second Supplemental Filing in Supp. of Mot. for New Trial and to Dismiss in the Interest of Justice.)

Without addressing at this time the merit to Defendant's argument, the Court notes that Defendant has alleged by way of his supplement that the State has engaged in prosecutorial misconduct. This is a serious claim and one which the State in its reply wholly denies, asserting that the document in question has not only been provided to Defendant, but that Defendant's counsel reviewed the file that contained the document. (See State's Resp. to Def.'s Second Supplemental Filing in Supp. of Mot. for New Trial and to Dismiss in the Interests of Justice, at 1.) The Court will refrain from addressing the parties' contentions back and forth, but would remind the Defendant that the burden is on him to demonstrate prejudice as a result of any alleged prosecutorial misconduct. State v. Parker, 149 Vt. 393, 405 (1988).

The Court will address the import of the document more fully in its Order on Defendant's motion for a new trial, but will note that although the document recounts Michelle Tatro as telling Ptl. Michael W. Plusch that she did not want to press charges, the following sentence states that A[s]he [Michelle Tatro] advised me that it would be alright if I charged him. (See Def.'s Second Supplemental Filing in Supp. of Mot. for New Trial and to Dismiss in the Interest of Justice, Attachment.) At best the document is ambiguous for the purpose of Defendant's argument here.

Defendant's Supplemental Memorandum in Support of his Renewed Motion to Dismiss

Defendant supplements his renewed Motion to Dismiss in a supplemental memorandum filed with the Court on December 30, 2004, citing the Court Staff's neglect in either turning off the Court's recording device, or not turning it on. Without belaboring the semantics of Defendant's motion, the Court will note that in fact the problem, since corrected, was a technical one independent of any neglect by the Court staff. The Court Reporters Associates' (CRA) letter of December 3, 2004, attached to Defendant's motion, reflects this fact.

Defendant bases his supplemental motion on the argument that Athe failure to properly record has caused substantial additional delay in the proceedings in this case, including the determination of post-trial motions and sentencing. (Def.'s Supplemental Mem. in Support of his Renewed Mot. to Dismiss for Denial of a Speedy Trial and in the Interest of Justice, or in the Alternative, for Release Pending Resolution, at 2.) Without acknowledging that he requested and agreed in writing to a lengthy continuance of his sentencing, Defendant now argues that he has been denied his fair trial rights. Insofar as the efforts associated with receiving newly reviewed trial transcripts from CRA caused further delay, this delay occurred within the time Defendant had agreed to a continuance of his sentencing, and therefore create no new basis on which the Court could dismiss under V.R.Cr.P. 48.

Motion for Release Pending Resolution

Defendant also requests release on concurrent bail and conditions pending the completion of his case in the District Court. Defendant's request is denied as there are no grounds at this time warranting Defendant's release following his conviction.

Conclusion

When the Court balances the factors in determining whether a speedy trial was denied, it must consider to some extent the cause of the delay. Keith, 160 Vt. at 268-69. As the Court noted in its order of April 19, 2004, Defendant made multiple

demands for substitute trial counsel, and caused a mistrial by his own actions that resulted in further delay. It is clear that the delay experienced by Defendant was in large part the result of his own actions during the course of his representation up to and through trial. This factor, based on Defendant's actions, does not weigh against the State in Defendant's claim. See Keith, 160 Vt. at 268 (citing State v. Unwin, 139 Vt. 186, 195-96 (1980)) (reason for delay other than deliberate attempt to hinder defense should not weigh against state).

In essence, Defendant wishes to assert that he has been prejudiced by way of forgetful or unavailable witnesses, in violation of a constitutionally guaranteed right, in part as a result of his own actions during the course of this case. Given Defendant's own contributions to the delays in his trial, witness Phillips' faulty memoryBeven despite deposition testimony that was inadmissible on its faceBdoes not rise to the level of prejudice that would merit dismissal. Nor does the unavailability of Kitteredge or Knapp rise to the level of prejudice that would merit dismissal, despite the State's admitted role in failing to assist Defendant in securing those witnesses. Defendant has not shown with any specificity that the claimed deficiencies regarding Knapp's or Kitteredge's testimony resulted in prejudice against Defendant such that his defense during trial was impaired due to their respective absences.

Defendant has failed to demonstrate prejudice as a result of his pre-trial delay, and the issues stemming from that delay. He has not

demonstrated, for example, any impairment of his defense at trial with any specificity as a result of the delay. Keith, 160 Vt. at 268. In order to show prejudice, Defendant must make specific claims, id. at 269, capable of demonstrating that the delay significantly affected his defense. Defendant has not done this in his renewed motion for dismissal based on the denial of a speedy trial. Therefore, Defendant's motion for dismissal under V.R.Cr.P. 48(b)(1) is **DENIED**.

Motion to Dismiss in the Interest of Justice

In his renewed motion to dismiss, Defendant fails to address with any specificity how his arguments meet the standard by which this Court reviews a motion to dismiss in the interest of justice under V.R.Cr.P. 48(b)(2). Because Defendant makes no new arguments with respect to a motion to dismiss under V.R.Cr.P. 48(b)(2), the Court will rest on its previous order of April 19, 2004, denying Defendant's previous motion to dismiss in the interest of justice, and therefore Defendant's renewed motion under V.R.Cr.P. 48(b)(2) is **DENIED**. (See Entry Order B Def.'s Mot. to Dismiss for Lack of Speedy Trial and in the Interest of Justice, at 3.)

ORDER

For the foregoing reasons, Defendant's Renewed Motion to Dismiss for Denial of Speedy Trial and in the Interest of Justice is **DENIED**.

Dated this ____ day of January, at Bennington, County of Bennington, Vermont, 2005.

_____
Honorable David Suntag
Presiding Judge

Appendix D

STATE OF VERMONT
BENNINGTON COUNTY, ss.

STATE OF VERMONT

V.

MICHAEL BRILLON

BENNINGTON DISTRICT COURT
DOCKET NO. 509-5-01; 957-7-01 (3 counts); 959-7-01; 382-4-03; 929-7-00 BnCr[6]

ENTRY ORDER – DEFENDANT'S MOTION TO DISMISS FOR LACK OF SPEEDY TRIAL AND IN THE INTERESTS OF JUSTICE

The defendant, through counsel, Attorney Kathleen Moore, has filed a motion to dismiss all pending dockets for lack of speedy trial and, in the alternative, in the interests of justice pursuant to V.R.Cr.P. 48(b)(2). The State opposes dismissal on these grounds. Defendant has requested a hearing on these motions. Assuming that all facts set forth in

[6] Docket 928-7-00 was dismissed on April 14, 2004 without opposition. The State, by the Court's granting of a motion/stipulation of March 15, 2004, had until March 26, 2004 to respond if in opposition.

the motion are true and considering what facts defendant states will be established at any hearing, the Court concludes that there is no real dispute as to any relevant facts and defendant is not entitled to the relief requested. A hearing is, therefore, not necessary. State v Allen, 145 Vt. 393 (1985).

The defendant currently faces the following charges in the various dockets: Obstruction of Justice/Habitual Offender; Aggravated Domestic Assault/Habitual Offender; Violation of Conditions of Release (2 counts); Operating with Suspended License [7]; Violation of Abuse Prevention Order, Second Offense/Habitual Offender; Unlawful Mischief. Three of the pending matters carry potential life sentences.

The defendant has been incarcerated since July 30, 2001 awaiting trials on these matters, some thirty-two months. Two trials were begun, both resulting in mistrials. In docket 928-7-00, a jury trial commenced on a then pending charge of felony Violation of Abuse Prevention Order/Habitual Offender, now dismissed. The trial ended in the declaration of a mistrial, not due to any fault on the part of the defendant. A Court trial commenced in

---

[7] The Court notes that the pending charge was filed prior to more recent amendments to the cited statute, which amendments may have decriminalized the charged behavior. Counsel should review the applicable statutes. The State should file a dismissal, if necessary and/or defendant may file to dismiss on these grounds within 2 weeks of entry of this order.

docket 382-4-03 on February 24, 2004. That trial ended in a mistrial due to defendant's actions.

Defendant has had a series of attorneys. As to a number of those attorneys, defendant has at various times sought removal and appointment of substitute counsel.

As both counsel acknowledge, a motion to dismiss for lack of speedy trial is to be analyzed according to the factors set forth by the United States Supreme Court in Barker v Wingo, 407 U.S. 514, 530 (1972); State v Keith, 160 Vt. 257, 266 (1993). Those factors are: 1.length of delay; 2. reason for delay; 3. defendant's efforts at obtaining a speedy trial; and 4. prejudice to defendant.

There is sufficient pre-trial delay to trigger further analysis. A thirty-two month delay while defendant is incarcerated is substantial.

The reasons for the delay are attributable to a number of factors: delay in the Defender General locating and assigning substitute counsel at various stages of the proceedings; defendant's demands for substitute counsel including his acknowledgment that such change would result in unavoidable delays in his cases; time requested by substitute counsel to prepare once assigned; defendant's own actions in his latest Court trial resulting in the necessity of withdrawal of counsel and granting of mistrial. The State was responsible for the delay attributed to a mistrial in docket 928-7-00. However, that mistrial occurred prior to defendant's incarceration and that matter is now dismissed.

Defendant's demands for trial have been, most often, made in the absence of such request from his counsel or without counsel indicting he/she was ready for trial. The present circumstances are illustrative. Defendant's current counsel has not demanded trial nor indicated that she is ready for trial. Nevertheless, counsel points to the record of defendant's own repeated requests to proceed to trial, usually without any such demand from his then counsel, and seeks a dismissal due to lack of speedy trial. This Court remains ready to schedule jury draw and trial within a reasonable time of defendant and his counsel's demand for same.

Lastly, defendant does not claim actual prejudice to his cases. At best, he asserts a fear that favorable witnesses will not have sufficient memory to testify and that it is probable that witnesses will be unavailable. There is no other claim even advanced. There being no claim that defendant's defense is actually impaired in any degree, the most significant fact for the Court's consideration weighs against the defendant. State v Roy, 151 Vt. 17, 37 (1993).

Defendant's motion to dismiss for lack of speedy trial is DENIED.

Defendant also seeks dismissal in the interests of justice, pursuant to V.R.Cr.P. 48(b)(2). The Court reviews this motion by considering the factors identified in State v Prior, 174 Vt. 49, 52 (2002). The defendant is charged with three offenses which carry a potential life sentence: aggravated

domestic assault; felony violation of abuse prevention order; and obstruction of justice. The State has provided notice that it intends to seek a potential life sentence enhancement due to a sufficient number of prior felony convictions to allow for an habitual offender finding. These charges are serious and each carries the greatest potential maximum sentence possible under Vermont state law.

Defendant claims that the extent of harm is not as great as in other cases, there being no alleged serious bodily injury or property damage. The domestic assault involves an allegation that the defendant punched his domestic partner on her head, causing swelling and bruising of her eye and mouth, that he did so in violation of Court ordered conditions of release which had been imposed for the purpose of protecting that person and that he has been convicted of three prior felony offenses. This is a serious charge. Obstruction of Justice is also a serious offense as is repeated violations of abuse prevention orders.

The extent of harm to the purported victim of the domestic assault or abuse prevention order violations has not been presented to the Court and is, therefore, unknown at this time. The defendant has been incarcerated for a substantial period pre-trial. Nevertheless, his most recent case was brought to trial, but resulted in a mistrial due to the necessity of his counsel's withdrawal based up the nature of defendant's testimony during that trial, a result caused solely by the defendant himself.

The Court does not find that dismissal of these serious matters would have a positive impact on public confidence in the judicial system, but rather the reverse, especially in light of defendant's actions at his last trial. There has been no information provided as to the attitude of the complainant(s) with respect to dismissal and, in fact, defendant asks the Court to give any such views little weight.

A review and balancing of these factors leads the Court to the conclusion that the defendant has not shown that dismissal would be in the interests of justice. His motion to so dismiss is, therefore, also DENIED.

Dated at Bennington, this 19 day of April, 2004.

David Suntag

_____

Presiding Judge

Appendix E

ENTRY ORDER

2008 VT 50

SUPREME COURT DOCKET NO. 2005-167

APRIL TERM, 2008

State of Vermont	)	APPEALED FROM:
	)	
v.	)	District Court of VT
	)	Unit No. 2 ,
Michael Brillon	)	Bennington

DOCKET NO. 957-7-01 Bncr

In the above-entitled cause, the Clerk will enter:

¶1. The State's motion for reargument fails to meet the criteria set forth in V.R.A.P. 40, and it is therefore denied. To the extent that the State's motion reveals a misstatement in ¶9 of the opinion, the opinion is corrected as follows: "The enhanced felony charge of second-degree aggravated domestic assault ~~(which was eventually dismissed)~~ resulted from the fact that defendant's assault on his girlfriend also violated the pre-trial condition of release prohibiting defendant from harassing his girlfriend.

BY THE COURT:

_____

Paul L. Reiber, Chief Justice

_____

John A. Dooley, Associate Justice

_____

Denise R. Johnson, Associate Justice

_____

Marilyn S. Skogland, Associate Justice

_____

Brian Burgess, Associate Justice

April 25, 2008

OPPOSITION BRIEF

No. 08-88

IN THE
SUPREME COURT OF THE UNITED STATES

State of Vermont,

Petitioner,

v.

Michael Brillon,

Respondent.

On Petition for a Writ of Certiorari
to the Vermont Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

William A. Nelson
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Middlebury, VT 05753
802-388-6781
Counsel for Respondent

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The respondent, Michael Brillon, respectfully requests that this Court deny the petition for a writ of certiorari, which seeks review of the Vermont Supreme Court's opinion in this case. The opinion is reported at 2008 VT 35 and on Westlaw, at 2008 WL 681425.

PETITIONER'S STATEMENT OF THE CASE

The petitioner's statement of the case (Pet. 4-5) covers some of the same ground as the Vermont court's fuller, and fairer, account of the reasons behind the nearly three-year delay in the trial of this case. Pet. 17a-27a, at ¶¶ 20-34. The petitioner's version omits to mention that Mr. Brillon was incarcerated without bail during the entire period; that his first attorney announced he was unprepared for trial because of his heavy caseload before petitioner "discharged" him, Pet. 4, and that lawyers assigned subsequently did little or nothing to bring the case to trial. For several months respondent was without counsel entirely. *Id.* 26a-27a, ¶¶ 33-34.

The court held that "a significant portion" of the three-year delay should be charged to the state's criminal justice system. Although the opinion does not specify this significant time in months and days, it *excludes* a major portion of defense-counsel-caused delays, a fact which the petitioner's statement of the case also fails to report. Pet. 24a-25a, ¶ 31.

REASONS WHY THE PETITION SHOULD BE DENIED

The petition transmogrifies a nuanced, microscopically factual, legally narrow opinion into a bizarre miscarriage, a "first in the history of American jurisprudence," Pet. 1, 15, which has "opened a Pandora's box," and "turn[ed] thirty-six years of jurisprudence" since *Barker v. Wingo*, 407 U.S. 514 (1972), "into chaos." Pet. 1, 18. Its

version of the Vermont court's holding is a straw-man, and the arguments it raises against it are raised in this Court for the first time.

1. Regarding petitioner's first question, the case neither reaches the holding petitioner objects to, nor raises the question petitioner presents.

The case does not present the question, as framed by the petitioner, "[w]hether continuances and delays caused solely by an indigent defendant's public defender can...be charged against the State" in a subsequent speedy trial motion. Pet. i. In the Vermont Supreme Court the state, through different counsel, conceded this point, equating such periods with delays caused by court congestion. Appellee State of Vermont's Brief at 23-24, 27-28, *State v. Brillon*, 2008 VT 35. Nor does it present a reviewable holding that, when a public defender or assigned counsel requests a continuance, the state will always be held responsible for the ensuing delay, as the petition asserts throughout, because the Vermont court squarely decided the contrary.

The Vermont court's *Brillon* decision held that a fourteen month period during which an indigent defendant either had no counsel at all, or only nominal counsel who took no action in the case beyond a notice of appearance and a motion to withdraw, should be charged against the state's criminal justice system and ultimately to the courts, not to the defendant. Mr. Brillon was assigned six lawyers during his three-year wait for a trial. The first was a public defender; the second and third were private lawyers on contract with the Office of the Defender General (who are paid by state funds but are not state employees. *Reed v. Glynn*, 168 Vt. 504 (1998)). Although the court agreed that none of the first three attorneys did much if anything to bring the case to trial, Pet 17a-20a, ¶¶ 20-24, it expressly *declined* to charge any of this period – July, 2001 to June 2002 –

against the court system or the state. Pet 24a-25a, ¶ 31.

The petitioner's bold and repeated statement, that this opinion means that "all delays caused by an indigent defendant or public defender are now charged against the State under the *Barker v. Wingo* test[,]" Pet. 17, see also Pet. 2 (indigent defendants need not worry about requesting a continuance because "whatever happens, it is the State's fault."), Pet. 17-18 (every delay requested by a public defender "will be charged to the state"), is demonstrably false.

The delays which the court did count began with the assignment of a contract attorney in June 2002:

> ...[W]e summarize the relevant and material facts of the two-year period between June 2002 and June 2004, keeping in mind that defendant had already been incarcerated at the *start* of that period for nearly a year on a felony charge stemming from a violation of a pre-trial condition of release. Defendant's fourth attorney, who was assigned in June 2002, stated at an August 2002 status conference that he needed an additional two months to prepare the case, and yet he apparently did little or nothing and finally conceded at a November 2002 status conference that his contract with the defender general had expired and he was giving up criminal defense work. A fifth attorney was not formally assigned until January 2003, and he was allowed to withdraw four and one-half months later without having done anything because of a change in his contract with the defender general's office. At that point, defendant had been incarcerated without a trial for approximately two years, and yet he was entirely without counsel for the next four months until the next assigned counsel took over in August 2003. Despite the already significant delay, the prosecution stipulated to several more continuances before a trial was finally held in June 2004

Id. ¶ 34 (court's emphasis). These periods of non-representation approximate the cases described in *United States v. Cronic*, 466 U.S. 648, 659-661 (1984), of defendants who either lacked counsel altogether, or were not provided counsel "in any substantial

sense...."

In *Barker v. Wingo* the Court wrote that delays caused by "negligence or overcrowded courts should be weighted less heavily [than deliberate delays] but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." 407 U.S. at 531. The Vermont Supreme Court considered that the provision of constitutionally effective defense counsel to indigent defendants was ultimately a court responsibility, and that a failure to do so was ultimately chargeable to the government.

> The defender general's office part of the criminal justice system, and ultimately it is the court's responsibility to assure that the system prosecutes defendants in a timely manner that comports with constitutional mandates.

Pet 28a, ¶ 35.

This is a statement of Vermont law. By statute the duty to provide defense services to needy persons rests initially with Vermont's defender general. 13 Vt. Stat. Ann. § 5253 (stating power of defender general to provide public defenders or contract attorneys to represent needy persons). But the Court has assumed coordinate responsibility for Vermont's trial court judges,

> to assure the availability of counsel to all persons adjudged in need thereof, confronted by proceedings which may involve potential loss of personal liberty, irrespective of their ability to pay for such representation, and under conditions in which persons having their own counsel would be entitled to be so represented. Courts should be diligent to recognize the need for counsel, and notify the public defender or assign counsel at the earliest time when persons providing their own counsel would be entitled to be represented by an attorney, unless a waiver is furnished and accepted. The circumstance that statutory authority of the right to representation by counsel does not appear to reach the matter involved is not to bar the exercise of the inherent

> power to provide counsel where it may be constitutionally required.

Vt. Admin. Order 4 §§ 1. See also *id.* § 3 (empowering courts to designate counsel if the public defender or contract lawyer is "unable, due to a conflict of interest or otherwise, to represent the person in question"). Attributing a failure of these responsibilities, and the ensuing lengthy delays, to the courts and the criminal justice system (of which the defender general is a part), falls easily within the *Barker* Court's category of delays caused by "negligence" and overcrowded dockets. This modest holding is distinctly not "a first in the history of American jurisprudence," Pet. 1. *State v. Stock*, 147 P.3d 885, 891-892 (N.M. 2006); *Middlebrook v. State*, 802 A.2d 268, 274-275 (Del. 2002); *State v. Magnusen*, 646 So.2d 1275, 1281 (Miss. 1994). See also *People v. Johnson*, 26 Cal.3d 557, 162 Cal.Rptr. 431, 606 P.2d 738, 747 (1980) (en banc) (reaching the same conclusion under the state's speedy trial rules).

Alternatively, if the Vermont court's recognition of the judiciary's duty does represent something beyond what *Barker* had in mind, or what the Sixth Amendment protects against, the prosecution never raised that objection in the courts below, and in fact it explicitly *conceded* the point in its brief to the Vermont Supreme Court, which admits that the period between November, 2002 and July, 2003, during which the defendant had no counsel or, for four-and-a-half months, an attorney in name only, should count against the state (albeit "less heavily" than deliberate delays would be). Pet. 26, ¶ 32; State of Vermont's Brief, at 27-28, citing *Barker* at 531. The court differed with the prosecution by including the preceding five months (June, 2002-November, 2002), as a time when the defendant's representation was also only nominal.

The question presented was therefore not only not decided by the court below; the prosecution never asked or argued it.

The Court has been adamant in its refusal to accept cases on certiorari "unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.'" *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). Recent cases reaffirm the basic requirement of preservation. See, e.g., *Howell v. Mississippi*, 543 U.S. 440, 444 (2005); *Adams v. Robertson*, 520 U.S. 83, 86-88 (1997). The rule applies equally to the state when, as here, the prosecution petitions for certiorari. *Illinois v. Gates*, 462 U.S. 213, 221 (1983).

Citing *Cardinale* in *Webb v. Webb*, 451 U.S. 493 (1981), the Court emphasized the policy considerations behind its rule. First were reasons of comity: "a proper respect for state functions, ... and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Id.* 499-500, quoting *Younger v. Harris*, 401 U.S. 37, 44 (1971) (internal quotations omitted).

But the requirement that federal questions first be raised in state courts also has "very practical" justifications. Among other things, it "insures that if there are independent and adequate state grounds that would pretermit the federal issue, they will be identified and acted upon in an authoritative manner." *Webb, at* 500.

That consideration weighs strongly against review in this case. The Vermont court reached its decision as a matter of both federal and state constitutional law.

> Both the federal and Vermont constitutions guarantee defendants a right to a speedy trial. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the

> right to a speedy and public trial by an impartial jury...."); Vt. Const. ch. I, art. 10 (persons have a right in all criminal prosecutions to "a speedy public trial by an impartial jury").

Pet. 10a, ¶ 11. The court had "adopted" the four-part framework of *Barker v. Wingo* as the Vermont Constitutional test, *id.* 11a, ¶ 12, implying a state constitutional orientation, but it made no "plain statement," *Michigan v. Long*, 463 U.S. 1032, 1041 (1983), that its decision rested ultimately on state grounds.

If the Vermont court had been presented with the prosecution's current claim – that construing *Barker* as it did would be turning thirty-six years of federal jurisprudence into chaos, Pet. 1, 18 – it could and likely would have relied explicitly on the Vermont constitution.

Local law and budgetary considerations play a major role in the opinion. The court was not sure "if this case represents an aberration or a growing crisis in the provision of defender general services in Vermont. Pet 5a, ¶ 3. If the problem was inadequate resources, the court urged the state legislature to act. *Id.*; Pet 38a-39a ¶ 51. If the egregious delays did not violate the Sixth Amendment, the court was free to respond to its local problem under its local charter, as it had shown an inclination to do in previous speedy trial cases. *State v. Keith*, 160 Vt. 257, 269-271 (1993) ("It may be necessary to look to our own constitution for a satisfactory solution that has not been forthcoming under the federal test."); *State v. Dean*, 148 Vt. 510, 515-16 (1987) (Vermont constitutional speedy trial guarantees "may offer additional protection against unreasonable delay in criminal cases"). The court has been one of the most active in the nation in developing a state-constitutional jurisprudence, and it is well-aware of *Michigan v. Long*'s "plain statement" rule. *State v. Brunelle*, 148 Vt. 347 (1987) ("Although

federal cases are discussed herein, we base our decision exclusively on the provisions of the Vermont Constitution." citing *Long*); *State v. Jewett*, 146 Vt. 221, 228 (1985).

The Vermont court had both the incentive and the constitutional authority to reach the result it did under the Vermont constitution, with a plain statement to that effect. But without the prosecution claim, presented here for the first time, that a ruling for the defendant would turn *Barker* on its head and extend *Gideon v. Wainwright*, 372 U.S. 335 (1963) to the breaking point, it had no reason to do so.

> 2. Regarding petitioner's second question, the issue was never argued to or decided by the state court, and presents no federal constitutional question for review.

The prosecution's second argument, that the Vermont court exceeded the right-to-counsel rule of *Gideon* by giving indigent defendants broader rights than defendants who can afford to retain counsel, Pet. 14, was not raised in any form in any of the state courts, and not considered or ruled on by the Vermont Supreme Court.

In essence, petitioner's second point is a mere Monday-morning add-on to its first point, arguing policy reasons why the court's decision was unwise, by allowing complementarily unfair advantages and disadvantages to indigent and non-indigent defendants.

These urgent policy arguments rest ultimately on the petitioner's false premise, that all delays requested by assigned counsel will be charged against the state in a subsequent speedy trial motion – a result the opinion deliberately rejects. More to the point, however, the wisdom or unwisdom of a state court decision is not a question appropriate for certiorari. Beyond petitioner's rhetorical assertion that the decision goes beyond the requirements of *Gideon* (while at the same time badly disadvantaging

indigent defendants, Pet. 14), the petitioner's second argument does not present any federal constitutional question for review.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Dated: August __, 2008

Respectfully submitted,

William A. Nelson
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802-388-6781
Counsel for Respondent

JOINT APPENDIX

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(4)

Supreme Court, U.S.
FILED
NOV 17 2008
OFFICE OF THE CLERK

No. 08-88

In the Supreme Court of the United States

STATE OF VERMONT,

Petitioner,

v.

MICHAEL BRILLON,

Respondent.

On Writ of Certiorari to the
Supreme Court of Vermont

JOINT APPENDIX

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Petition for Writ of Certiorari Filed July 15, 2008
Certiorari Granted October 1, 2008

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SUPREME COURT OF VERMONT

2005-167 Closed
From Bennington District Appeal Criminal
Orig.Dkt.# 957-7-01 BnCr Judge(s): Suntag D.;
Carroll E;
Wesley J

STATE OF VERMONT v. MICHAEL BRILLON*
Appellee Appellant

	Date Due	Filed/ Waived	Prog Order Issued
Filed in Trial Court OR Board:		04/18/2005	
Notice of Appeal:		04/25/2005	
Trans. Ordered:	05/02/2005	05/02/2005	
AA Docking Stmt:	05/02/2005	05/02/2005	
AE Docking Stmt:	05/16/2005		
Record Complete:	06/27/2005	02/10/2006	
Appellant Brief:	05/15/2006	05/16/2006	Yes
Appellee Brief:	01/15/2007	01/12/2007	Yes
Considered on:	03/14/2007	Argued	
Decided:	03/14/2008	cwcj	rr
Reopened:	11/14/2006	Closed:	04/25/2008

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1413 Tartter, David F.
Appellant's Attorney(s)
930 Nelson, William A.

DOCKET ENTRIES for 2005-167

04/19/2005 Copy of Notice of Appeal rec'd from Atty. Moore. (cgattone)

04/20/2005 Case files (2), PSI, exhibits, etc. rec'd

	from tc. (In big box in exhibit room). Some documents are being retained at tc. (cgattone)
04/25/2005	Notice of appeal received. Original notice filed in trial court 04/18/2005. Entry fee not paid, PD at tc. Cert. docket entries and Notice of Hrgs. Rec'd from tc. (cgattone)
04/27/2005	Updated cert. docket entries, approved IFP & assignment of counsel rec'd from tc. (cgattone)
05/02/2005	TOF and AADS fi by Atty. Moore, cc'd Attys. Fulcher and Marthage. (cgattone)
07/22/2005	Atty. Fulcher called to advise Atty. Nelson will be representing def. Changed 4d. (jmckeon)
08/08/2005	Notification of transcript completion for hearings held 1/20/05 1/21/05 & 3/23/05, record not complete. (jmckeon)
08/15/2005	Notice of appearance on behalf of State & AEDS fi by Atty. Tartter. Added to 4d screen. Does not reference transcripts. (jmckeon)
09/02/2005	Notice of appearance on behalf of Michael Brillon in lieu of Atty. Fulcher & Moore fi by Atty. Nelson. Atty. Nelson already on 4d, Fulcher not on. (jmckeon)
10/10/2005	After call to CRA, Cheryl informed me that the transcripts for the 4 day Jury Draw/Trial were previously ordered and that Atty. Fulcher was told she could get them from Atty. Moore. RECORD COMPLETE, counsel notified. (cgattone)
11/02/2005	Stipulation for ext of time to file AAB &

PC til 12/09/05 signed by counsel. (jmckeon)

12/01/2005 Another TOF fi by Atty. Nelson. Motion to Strike Notice of Completion of Record fi by Atty. Nelson, cc'd Atty. Tartter. (cgattone)

12/12/2005 ENTRY ORDER. BLB. The motion to strike record complete is granted. The record will be deemed complete upon transcription of the additional transcripts ordered on 11/29/05. Cc of EO to counsel. (cgattone)

02/10/2006 Notification of transcript completion rec'd from CRA together w/ a ltr. from the tc indicating that there were no log events for hrgs. on 8/5/02, 11/26/02, and 1/8/03, taken off 3d screen. RECORD COMPLETE, counsel notified. (cgattone)

02/16/2006 Notification from CRA that 3 more transcripts were complete - 8/5/02, 11/26/02 and 1/8/03. Put back on 3d screen. (cgattone)

03/16/2006 Stipulation for ext of time to file PC & AAB until 4/11/06 signed by counsel. (jmckeon)

03/30/2006 Ltr of request for exhibits from jury trial & sentencing hearing to be sent to this Court rec'd from Atty. Nelson. Req'ts he be notified when exhibits are here so he can come & look at them. Checked box & appears exhibits are here with exception of state's exh. 12, the 12 pack of Heinekin. Contacted Atty. Nelson & advised exhibits are here. (jmckeon)

04/06/2006	TO for hearings held on docket nos. 200-2-81 & 635-5-82 Bncv rec'd from DG's office. (jmckeon)
04/10/2006	Motion for Extension of Time to File PC and AAB until 5/15/06 fi by Atty. Nelson, cc'd Atty. Tartter. Atty. Nelson borrowed videotape and audiotape from exhibits to copy. (cgattone)
04/14/2006	State's Exhibits 10 and 11 (audio and video tape) ret'd from Atty. Nelson. (cgattone)
04/18/2006	ENTRY ORDER. MSS. PC and AAB shall be fi by 5/15/06 or sanction may be imposed. cc of EO to counsel. (cgattone)
05/16/2006	AAB fi by Atty. Nelson, cc'd Atty. Tartter. Unopposed Motion Pursuant to VRAP 28.(h) for additional pages fi by Atty. Nelson, cc'd Atty. Tartter. (cgattone)
05/18/2006	PC fi by Atty. Nelson, cc'd SA's office. (cgattone)
05/23/2006	ENTRY ORDER. MSS. The motion for permission to file an oversize brief is granted. cc of EO to counsel. (cgattone)
05/25/2006	Stipulation for ext of time to file AEB until 6/26/06 signed by counsel. (jmckeon)
06/26/2006	Motion for Extension of Time to file AEB until 7/17/06 fi by Atty Tartter, cc'd Atty. Nelson. (cgattone)
06/29/2006	ENTRY ORDER. MSS. AEB shall be fi by 7/17/06. cc of EO to counsel. (cgattone)
07/19/2006	Stipulation fi by counsel. (Stip. to

remand - processed as motion). (cgattone)

07/27/2006 ENTRY ORDER; MSS. In light of the stip of the parties, def's sentence in Docket No. 957-7-01 Bncr is vacated and the case is remanded to the Benn. Dist. Crt. for resentencing pursuant to the parties stipulation. CC of EO to parties & tc. (jmckeon)

07/31/2006 ENTRY ORDER. MSS. We previously ordered that this case be remanded pursuant to a stip. of the parties. We now withdraw that order, and order that the case be remanded to the Bennington District Court for reconsideration of defendant's sentence. cc of EO to counsel and tc. (cgattone)

08/04/2006 Appellant's Motion to Reinstate Entry Order of 7/27/06 or for Full Court of EO of 7/31/06 fi by Atty. Nelson. CC'd Atty. Tartter. (jmckeon)

08/09/2006 TC called & requested EO's of 7/27/06 & 7/31/06 be faxed to tc. Sent EO's by fax. (jmckeon)

08/29/2006 Call from/to tc. Fax them the EO as soon as it is entered. (cgattone)

09/05/2006 ENTRY ORDER., PLR, JAD, DRJ, MSS, BLB. Defendant moves to reinstate the entry order of 7/27/06, which had been withdrawn and replaced by a 7/31 entry order. The motion is denied. (See full order.) We hereby vacate the original sentence and remand for the district court to reconsider the sentence in light of the stipulation. cc of EO to counsel

	and tc, faxed to tc. (cgattone)
09/15/2006	Cert. down to tc. Case files (2) w/ PSI, exhibits, etc., EO's, PC and AAB ret'd to tc in bankers box. Only kept for our file an AAB, did not have extra copies of PC. (cgattone)
10/25/2006	Fax rec'd tc - Entry Order - Re-sentencing dated 10/24/06. They kept the original sentence and did not reduce it. (cgattone)
10/31/2006	Ltr. rec'd from Atty. Nelson to confirm conversation of last week that Judge Suntag's order of 10/24/06 has not terminated this appeal. Requests that AEB be ordered to be filed 21 days after Judge Suntag's order of 10/24/06, cc'd Atty. Tartter. Calls to/from tc to request file back. (cgattone)
11/02/2006	ENTRY ORDER. JAD. AEB shall be fi by 11/14/06. cc of EO to counsel. (cgattone)
11/07/2006	Motion for Extension of Time to file AEB until 1/15/07 fi by Atty. Tartter, cc'd Atty. Nelson. (cgattone)
11/13/2006	ENTRY ORDER; JAD. The State's mot for ext of time is granted. AEB shall be fi by 1/15/07 or sanctions may be imposed. CC of EO to parties. (jmckeon)
11/14/2006	Case file along with briefs & this Court's file rec'd back from the tc. TC has retained transcripts & Judge's notes. (jmckeon)
01/05/2007	Motion for Permission to File Overlong Brief fi by Atty. Tartter. CC'd Atty.

	Nelson. (jmckeon)
01/08/2007	Ltr. rec'd from Atty. Tartter advising the Court that he will be out of the office from 2/22/07 through 3/30/07. (cgattone)
01/10/2007	ENTRY ORDER; MSS. The State's motion to fi a brief in excess of the 30 page limit is granted. CC of EO to parties. (jmckeon)
01/12/2007	AEB fi by Atty. Tartter, cc'd Atty. Nelson. (cgattone)
01/18/2007	PC and AAB copies rec'd back from copy center. (cgattone)
01/29/2007	Motion for Ext. of Time to File ARB until 2/23/07 fi by Atty. Nelson. CC'd Atty. Tartter. (jmckeon)
02/01/2007	ENTRY ORDER; DRJ. AA's mot for ext of time to file his ARB is granted. ARB shall be fi by 2/23/07 or sanctions may be imposed. CC of EO to parties. (jmckeon)
02/05/2007	Confirm oral argument ltrs. to counsel to respond by 2/20/07. (cgattone)
02/09/2007	Confirmation that oral argument is requested fi by Atty. Nelson, cc'd Atty. Tartter. (cgattone)
02/23/2007	ARB fi by Atty. Nelson, cc'd Atty. Tartter and Valerio. Call from Atty. Nelson, after reading ARB he noticed some mistakes and will be sending 12 new ARBs. (cgattone)
02/26/2007	New ARB fi by Atty. Nelson. Previous ARB's recycled. (jmckeon)
03/01/2007	Ltr. to counsel to advise that this case will be heard in Bennington on 3/14/07. (cgattone)

03/05/2007	AAB fi by Atty. Nelson to replace previously filed AAB that had pages missing. (cgattone)
03/14/2007	HEARD BY FULL COURT, PLR, JAD, DRJ, MSS, BLB. Argued by Attys. Treadwell & Nelson. (jmckeon)
03/21/2007	Transcripts delivered by Atty. Tartter's office - - 6/15/04, 6/16/04 and 6/17/04. (cgattone)
08/31/2007	Transcripts delivered by Atty. Tartter's office - 7/30/01, 10/2/01, 10/23/01, 1/16/02, 2/22/02, 2/25/02, 6/11/02, 8/5/02, 11/26/02, 1/8/03, 8/11/03, 9/8/03, 4/26/04, 6/14/04, 8/25/04, 10/6/04, 1/20/05 (2 volumes, 2 separate hrgs.), 1/21/05 and 3/23/05. (cgattone)
03/14/2008	Unopposed Motion for Immediate Issuance of the Mandate fi by Atty. Nelson, cc'd Atty. Tartter. Entry of Appearance fi by Atty. Erica A. Marthage together w/ltr. indicating that she intends to file a Motion for Reargument, cc'd Attys. Tartter and Nelson. (cgattone) Case file rec'd from Public records. (jmckeon) ENTRY ORDER; PLR, JAD, DRJ, MSS, BLB; Johnson author, Burgess dissenting joined by Reiber: The district court's decision denying defendant's motion to dismiss for lack of speedy trial is reversed and the matter remanded to the district court with directions to set aside the convictions, vacate the sentence, and

dismiss with prejudice the charges against defendant. cc of EO and opinion to counsel, trial court, trial judge. (larry)

03/17/2008 Ltr. from Atty. Marthage stating that her office is co-counsel w/AG's office. Ltr. confirms office does not waive the Right to Reargument period in this case rec'd by fax. CC'd attys. Nelson & Tartter. Original in mail. (jmckeon)

03/18/2008 Notice of appearance fi by atty. Marthage. CC'd Attys. Tartter & Nelson. Added to 4d screen. Another copy of ltr. of objection to waiving right to reargument period fi by Atty. Marthage. (jmckeon)

03/19/2008 ENTRY ORDER. FULL COURT, PLR, JAD, DRJ, MSS, BLB. Appellant's motion to issue the mandate forthwith is denied. cc of EO to counsel and tc, faxed to TC and Attys. Tartter and Marthage, Atty Nelson's fax was not working, so I called and read it to him. (cgattone)

03/28/2008 Memorandum in Support of Motion for Reargument fi by Atty. Marthage. CC'd Attys. Nelson & Tartter. (jmckeon)

04/16/2008 ENTRY ORDER. FULL COURT. PLR, JAD, DRJ, MSS, BLB. The State's motion for reargument fails to meet the criteria set forth in VRAP 40, and it is therefore denied. To the extent that the State's motion reveals a misstatement in Para. 9 of the opinion, the opinion is corrected. (See full EO.) cc of EO to counsel and tc. (cgattone)

04/25/2008	Transcripts ret'd to Atty. Tartter - 6/15/04, 6/16/04 and 6/17/04. Transcripts ret'd to Atty. Nelson - 7/30/01, 10/2/01, 10/23/01, 1/16/02, 2/22/02, 2/25/02, 6/11/02, 8/5/02, 11/26/02, 1/8/03, 8/11/03, 9/8/03, 4/26/04, 6/14/04, 6/15/04, 6/16/04, 6/17/04, 8/25/04, 10/6/04, 1/20/05 (2 vols., 2 separate hrgs.), 1/21/05 and 3/23/05. Cert. down to trial court. Case file w/ exhibits, EO's, PC, AAB, AEB and ARB ret'd to tc. (cgattone)
07/24/2008	Notification from U.S. Supreme Court the Petition for writ of certiorari was filed on 7/15/08 & placed on the 7/18/08 docket as No. 08-88. (jmckeon)
10/03/2008	Ltr. from US Supreme Court advising that the motion to proceed in forma pauperis is granted and the petition for a writ of certiorari is granted. (cgattone)

Vermont District Court
Unit 2, Bennington Circuit

Docket No. 957-7-01 Bncr
State v. Brillon, Michael J. 957-7-01 Bncr

Prosecutor: Erica Marthage
Defendant: Michael J. Brillon
DOB: 12/08/1962
POB: Bennington VT
Atty: William A. Nelson
Motions pdg:
Bail set:
Incarcerated: released
Conditions:
Aliases:
Case Status: Disposed
Address: 1605 E. Main Street, Sayre OK 73662
Next Hearing:

Dspt	Docket No.	Ct.	Statute	F/M/O	
1	957-7-01 Bncr	1	13 1044(a)(1)	fel	7/31/06 Reopened
	2ND DEGREE DOMESTIC ASSAULT/HAB OFF				
2	957-7-01 Bncr	2	13 7559(E)	mis	3/23/05
	CONTEMPT OF COURT			Verdict by jury of	
3	957-7-01 Bncr	3	13 7559(E)	mis	6/14/04
	CONTEMPT OF COURT			Dismissed by state	
4	959-7-01 Bncr	4	23 674(c)	mis	04/26/04
	DLS #4 OR ABOVE			Dismissed by state	

07/30/01

1046487 - cfile - status set to apar
Information and Affidavit filed on 3 disputes. Custody status: Marble Valley Regional Corr Fac (Rutland).
1046490 - charge
Dispute 1 for Docket no. 957-7-01 Bncr Count #1, 2ND DEGREE DOMESTIC ASSAULT/HAB OFF, Felony, 13 V.S.A. 1044(a)(1). Alleged offense date: 07/27/01. Arrest/citation date: 07/27/01 Bennington CSD.
1046493 - charge
Dispute 2 for Docket No. 957-7-01 Bncr Count #2, CONTEMPT OF COURT, Misdemeanor, 13 V.S.A. 7559(E) VRCRP 42. Alleged offense date: 07/27/01. Arrest/citation date: 07/27/01 Bennington CSD.
1046495 - charge
Dispute 3 for Docket No. 957-7-01 Bncr Count #3, CONTEMPT OF COURT, Misdemeanor, 13 V.S.A. 7559(E) VRCRP 42. Alleged offense date: 07/27/01. Arrest/citation date: 07/27/01 Bennington CSD.
1046496 - charge
Dispute 4 for Docket No. 959-7-01 Bncr Count #1, DLS #4 OR ABOVE, Misdemeanor, 23 V.S.A. 674(c). Alleged offense date: 07/23/01. Arrest/citation date: 07/23/01 Bennington PD.
1046497 - pcfound
Probable Cause found by Judge Nancy S. Corsones on disputes 1-4.
1046498 - hrgset
Arraignment set for 07/30/01 at 12:30 PM.
1046499 - hrgset

Calendar Call set for 09/11/01 at 01:00 PM.
1046799 - pdasg
Attorney assigned: Richard F. Ammons, Jr. PD.
1046801 - hrgheld
Arraignment held by Nancy S. Corsones. (TAPE).
1046802 - rule5
Copy of Affidavit and Information given to defendant. 24 hour rule waived.
1046803 - plea - status set to aptr
Reading of Information waived. Defendant pleads not guilty on disputes 1-4. Pre-trial discovery order issued.
1046811 - bailset
Defendant to be held without bail.
1046812 - bailmitt
Mittimus for Failure to Give Bail issued. Custody status: Marble Valley Regional Corr Fac (Rutland). Conditions of Release signed by defendant.
1046813 - note
Note: SET FOR EVIDENTIARY HEARING HELD UNDER 7553 State will be filing motion to revoke bail in 2 other underlying charges- when it is set- notify Altieri and G. Harris.
1046821 - bailset
Cash bail set by Nancy Corsones on dispute 2-4. Amount this dispute(s): 5000.00, Total: 5000.00, concurrent: 509-5-01; 928-7-00 Bncr. Condition[s] 1,3,7,10,12,17-19 imposed: No. 10: to post $5000.00 cash or surety bail; additional conditions: Defendant shall let his or her attorney and the court clerk know, in writing a telephone number and physical address where

s/he resides. Defendant shall be subject to arrest without warrant pursuant to VRCRP 3(a) (b) if s/he does not appear as directed in these conditions 14. Defendant shall not stalk, harass, cause to be harassed, telephone, write, contact in any way, or directly or indirectly communicate with: Michelle and Terry Tatro.

1046823 - bailmitt

Mittimus for Failure to Give Bail issued. Custody status: Marble Valley Regional Corr Fac (Rutland). Conditions of Release signed by defendant. Public Defender requested.

1046837 - pdord

Request granted for public defender. 25.00 to be paid; Payment Order No. 15145.

1285407 - judgerec

Judge David A. Howard recused.

08/03/01

1048756 - hrgset

Other set for 09/06/01 at 10:30 AM. EVIDENTIARY HEARING.

1048765 - hrgcan

Other scheduled for 09/06/01 corrected.

08/08/01

1050745 - hrgset

Other set for 08/13/01 at 03:30 PM. EVIDENTIARY HEARING.

08/13/01

1052414 - hrgcan

Other scheduled for 08/13/01 cancelled due to court schedule.

1052415 - hrgset

Other set for 08/15/01 at 01:00 PM. Set for Evidentiary Hearing.

08/20/01

1054235 - hrgcan

Other scheduled for 08/15/01 rescheduled.

09/07/01

1061859 - hrgcan

Calendar Call scheduled for 09/11/01 continued.

1061860 - hrgset

Calendar Call set for 09/25/01 at 08:30 AM.

09/10/01

1063066 - hrgcan

Calendar Call scheduled for 09/25/01 cancelled.

09/17/01

1065109 - hrgset

Other set for 10/02/01 at 03:00 PM.

10/02/01

Tax referral on Payment #16536 Order #15145.

1071856 - hrgheld

Other held by Karen R. Carroll. (KP).

1071859 - entorder

Entry Order: Defense to file motion to recuse Judge Carroll by 10/3/01. State to respond by 10/9/01.

10/03/01

1072451 - motion

Motion to Recuse filed by Attorney Richard F. Ammons, Jr. PD for Defendant Michael J. Brillon on disputes 1-4. Motion to Recuse given to judge.

10/08/01

1073959 - document

1 document filed by Attorney Brian Marthage for party 2: Supplemental Rule 16 disclosure.

1073960 - document

1 document filed by Attorney Brian Marthage

for party 2: State's response Mo to recuse.

10/09/01

1075092 - motreact

Motion to Recuse denied by Judge Karen R. Carroll.

1075101 - entorder

Entry Order: The Court believes it can fairly and impartially preside over the deft's cases. This matter will be referred to the Administrative Judge.

10/10/01

1075103 - note

Note: Motion to Recuse forwarded to Judge McCaffrey.

10/17/01

1077365 - hrgset

Motion Hearing set for 10/23/01 at 01:00 PM. BY TELEPHONE.

10/23/01

1079699 - hrgheld

Motion Hearing held by Francis B. McCaffrey. (LL).

1079700 - entorder

Entry Order: November 6 memos/transcripts due by both sides.

11/20/01

1106891 - note

Note: Opinion and Order issued by Judge McCaffrey. Motion to Recuse Judge Carroll Denied. See written Opinion in file.

11/27/01

1097786 - document

1 document filed by Attorney Brian Marthage for party 2: Deposition of Peter McConnell.

12/28/01

1103435 - document

2 documents filed by Attorney Brian Marthage for party 2: Request for Final Felony Pre-Trial and; Placement on the Feb. Trial List.

1103438 - motion

Motion Final Fel. Pre-Trial and Feb. Trial List filed by Attorney Brian Marthage for Plaintiff State on disputes 1-4. Motion Final Fel. Pre-Trial and Feb. Trial List given to judge.

01/03/02

1106902 - motdisp

Motion 2 (Final Fel. Pre-Trial and Feb. Trial List) granted by Karen R. Carroll. Court will schedule a pre-trial status conference and an evidentiary hearing on the hold without bail status.

1240042 - motreact

Motion Final Fel. Pre-Trial and Feb. Trial List see Order by Judge Judge Karen R. Carroll.

1240043 - entorder

Entry Order: Court will schedule a pretrial status conference and an evidentiary hearing on the hold without bail status ASAP.

01/08/02

1106701 - hrgset

Other set for 01/09/02 at 10:00 AM. Scheduled for an evidentiary hearing.

01/09/02

1107863 - hrgcan

Other scheduled for 01/09/02 rescheduled.

1107865 - hrgset

Other set for 01/16/02 at 10:00 AM. Rescheduled from 1/9/02.

1110531 - document
1 document filed by Attorney Brian Marthage for party 2: Deposition of Michelle Tatro.
1240044 - document
1 document filed by Attorney Brian Marthage for party 2: Supplemental Rule 16 Disclosure.
1240045 - document
1 document filed by Attorney Brian Marthage for party 2: Supplemental Rule 16 Disclosure.

01/15/02

1110527 - document
3 documents filed by Attorney Brian Marthage for party 2: Deposition of Diana Kittridge; Chris; Lauzon; Clayton Knapp; John Behan; William Collins; Barbara Croft.

01/16/02

1110428 - document
2 documents filed by Attorney Brian Marthage for party 2: Deposition of Michelle Tatro; Karo; Prouty; Terry Tatro; Dorothy Powers.
1110589 - hrgheld - status set to atri
Other held by Karen R. Carroll. (TAPE).
1110591 - note
Note: Opinion and Order regarding Release Pending Trial filed by Judge Karen Carroll. Deft. to be held without bail while awaiting trial on this docket.
1110594 - note
Note: Defendant is continued to be held without bail on Ct. 1 and $5000.00 bail on Cts. 2-4.

01/17/02

1110935 - motion
Motion to Continue Discovery & Feb. Jury Draw filed by Attorney Richard F. Ammons, Jr. PD for

Defendant Michael J. Brillon on disputes 1-4 Motion to Continue Discovery & Feb. Jury Draw given to judge.

01/18/02

1110934 - hrgset

Jury Drawing set for 02/06/02 at 09:00 AM.

01/22/02

1113762 - document

1 document filed by Attorney Brian Marthage for party 2: Response to Motion to Continue.

01/23/02

1113758 - motdisp

Motion 3 (to Continue Discovery & Feb. Jury Draw) denied by Karen R. Carroll. See written order on Motion Reaction Form issued by Judge Carroll.

1113759 - hrgcan

Jury Drawing scheduled for 02/06/02 rescheduled.

1113760 - hrgset

Jury Drawing set for 02/26/02 at 01:00 PM. Pick & Go Jury Trial.

1113761 - hrgset

Jury Trial set for 02/27/02 at 08:30 AM.

1240046 - entorder

Entry Order: The victim and the 3 arresting officers can easily be deposed prior to trial given that the victim has been deposed once and only minor issues remain. The testimony of the 3 arresting officers should be very brief so depositions should not be lengthy. The defendant has had 6 mths (7 at time of trial) to develop its case and was even able to question the states witnesses at the evidentiary bail

hearing.

01/25/02

1240047 - document

1 document filed by Attorney Brian Marthage for party 2: Supplemental Rule 16 Disclosure.

02/15/02

1240051 - document

1 document filed by Attorney Brian Marthage for party 2: Rule 26 Disclosure.

02/22/02

1122476 - motion

Motion to Continue filed by Attorney Richard F. Ammons, Jr. PD for Defendant Michael J. Brillon on disputes 1-4. Motion to Continue given to judge.

1240048 - motdisp

Motion 4 (to Continue) denied by Karen R. Carroll.

1240049 - entorder

Entry Order: After hearing on the motion on Feb. 22, 02 with defendant participating by interactive tv, the court denies the motion to continue.

1240050 - document

1 document filed by Attorney Brian Marthage for party 2: Supplemental Rule 16 Disclosure.

02/25/02

1123000 - motion

Motion in Limine filed by Attorney Brian Marthage for Plaintiff State on disputes 1-4. Motion in Limine given to judge.

1123002 - motion

Motion to Withdraw filed by Attorney Richard F. Ammons, Jr. PD for Defendant Michael J.

Brillon on disputes 1-4. Motion to Withdraw given to judge.

1123383 - motdisp

Motion 6 (to Withdraw) granted by Karen R. Carroll. Parties notified on the record.

1123388 - entorder

Entry Order: Court to assign Matt Harnett, Ese. Set status in 30 days.

1123393 - hrgcan

Jury Drawing scheduled for 02/26/02 cancelled.

02/26/02

1123692 - hrgcan

Jury Trial scheduled for 02/27/02 cancelled.

02/28/02

1124611 - pdasg

Attorney assigned: Matthew Harnett.

1124612 - note

Note: SFU Assignment (Matt Harnett assigned).

03/01/02

1125021 - note

Note: Defender General contacted court that Atty Harnett has conflict. Assign Atty Altieri.

1125022 - pdasg

Attorney assigned: Gerard J. Altieri.

04/02/02

1240052 - document

1 document filed by Attorney Gerard J. Altieri for party 1: Notice of Self Defense.

04/04/02

1138532 - motion

Motion Special Assignment to Judge Carroll filed by Attorney Brian Marthage for Plaintiff State on disputes 1-4. Motion Special Assignment to Judge Carroll given to judge.

04/09/02

1139541 - motreact
Motion Special Assignment to Judge Carroll to wait for Memo in Opposition Judge David A. Howard.

1139542 - entorder
Entry Order: Motion for special assignment to Judge Carroll filed by State and forwarded to Judge McCaffrey for review and response.

04/16/02

1144179 - motdisp
Motion 7 (Special Assignment to Judge Carroll) denied by Francis B. McCaffrey. Denied by Judge McCaffrey - The court finds that there is nothing complex about this action warranting special assignment.

1240053 - entorder
Entry Order: The court finds that there is nothing complex about this action warranting special assignment.

05/20/02

1155008 - motion
Motion Dismiss Assigned Counsel fi[illegible] by Defendant Michael J. Brillon on disput[illegible]s 1-4. Motion Dismiss Assigned Counsel given to judge.

05/21/02

1155836 - motreact
Motion Dismiss Assigned Counsel set for hearing per Judge John P. Wesley.

06/03/02

1159409 - hrgset
Motion Hearing set for 06/11/02 at 11:30 AM. Hearing to be held in Family Court.

1159810 - hrgcan
Motion Hearing scheduled for 06/11/02 rescheduled.
1159811 - hrgset
Motion Hearing set for 06/11/02 at 01:15 PM.
06/11/02
1164075 - hrgheld
Motion Hearing held by John P. Wesley. (TAPE).
1164076 - entorder
Entry Order: Appoint substitute counsel. Set for status conference as soon as possible after appointment is made.
1164078 - pdasg
Attorney assigned: Paul Donaldson.
07/30/02
1180596 - hrgset
Status Conference set for 08/05/02 at 10:30 AM. Scheduled before Judge Wesley.
08/05/02
1201960 - hrgheld
Status Conference held by John P. Wesley. (TAPE).
1201962 - entorder
Entry Order: Defense to respond no later than 08/23/02 regarding any prior notice of bad acts evidence. Defense to disclose witnesses no later than 09/16/02. State to file any motion in limine re: defense disclosures no later than 9/23. Case to be placed on Oct. jury list with priority given due to deft's custody status.
10/22/02
1211859 - motion
Motion to Dismiss & Replace Ct. Assg. Atty filed

by Defendant Michael J. Brillon on disputes 1-4. Motion to Dismiss & Replace Ct. Assg. Atty given to judge.

10/31/02

1217847 - motreact

Motion to Dismiss & Replace Ct. Assg. Atty set for hearing per Judge David T. Suntag.

1217848 - hrgset

Motion Hearing set for 11/13/02 at 11:45 AM.

11/13/02

1221172 - hrgcan

Motion Hearing scheduled for 11/13/02 cancelled.

1221173 - entorder

Entry Order: Defendant not transported - reschedule motion hearing and transport defendant.

11/15/02

1221176 - hrgset

Motion Hearing set for 11/26/02 at 11:30 AM. Defendant will be transported.

11/26/02

1225821 - hrgheld

Motion Hearing held by David T. Suntag. (TAPE).

1225822 - motdisp

Motion 9 (To Dismiss & Replace Ct. Assg. Atty) order issued by by David T. Suntag. See Judge's written order in file.

1225823 - note

Note: This defendant's cases are being reassigned to the Serious Felony Unit - David Sleigh. Lora Evans to notify Atty Sleigh of the assignment, this court to send notice to Mr.

Sleigh of next court date.
1225824 - hrgset
Status Conference set for 01/08/03 at 01:15 PM.
1225825 - couwith
Attorney Paul Donaldson withdraws.
01/08/03
1239008 - hrgheld
Status Conference held by Karen R. Carroll. (KP).
1239009 - entorder
Entry Order: Within 2 weeks the Defender General will provide the Court with the name of the attorney that will be representing Mr. Brillon. The Court will set status conference after that.
01/15/03
1238628 - pdasg
Attorney assigned: David C. Sleigh.
01/30/03
1248637 - hrgset
Status Conference set for 02/20/03 at 02:00 PM.
02/03/03
1249477 - hrgcan
Status Conference scheduled for 02/20/03 rescheduled.
1249478 - hrgset
Status Conference set for 02/19/03 at 01:30 PM.
02/19/03
1256716 - hrgheld
Status Conference held by David T. Suntag. (OFFREC).
1256717 - entorder
Entry Order: Attorneys Altieri and Donaldson are hereby ordered to transfer any files they

now possess concerning the above docketed cases to the law firm of Sleigh and Williams within 1 week of this order.

1256719 - entorder

Entry Order: All defense witnesses shall be disclosed to the State no later than 3/30/03. All depositions to be taken by the defense or state shall be complete no later than 4/30/03. Should the defense wish to re-depose any witness, permission to do so will be required from the court. Defense shall file for such permission within such time as to allow the court to rule and to complete depositions by 4/30/03. All motions, notices, including all motions in limine which are to be filed no later than 4/30/03. Opposing counsel shall have 10 days from filing of such motions/notices to file response. The court will consider any opposition to such filings based on lack of timeliness when and if raised in response. Court will schedule a status in 30 days. Counsel may participate by phone. Status conferences on remaining cases will be held upon resolution of this docket. Trial date - late May 2003. 2 days. Pick and Go.

02/26/03

1260177 - motion

Motion Enlarge time filed by Attorney David C. Sleigh for Defendant Michael J. Brillon on disputes 1-4. Motion Enlarge time given to judge.

03/05/03

1261698 - motreact

Motion Enlarge time to wait for Memo in Opposition Judge David T. Suntag.

1261699 - entorder
Entry Order: Response due NLT 3/10/03.

03/17/03

1266885 - motdisp
Motion 10 (Enlarge time) granted by David T. Suntag. Per State Agreement.
1411572 - motdisp
Motion 10 (Enlarge time) granted by David T. Suntag.

03/18/03

1266908 - entorder
Entry Order: Granted Defendant's Motion to continue various deadlines.

04/23/03

1282042 - motion
Motion to Dismiss for Lack of Prima Facie filed by Defendant Michael J. Brillon on disputes 1-4. Motion to Dismiss for Lack of Prima Facie given to judge.

04/28/03

1285091 - motreact
Motion to Dismiss for Lack of Prima Facie see Order by Judge Judge David T. Suntag.
1285092 - entorder
Entry Order: Response due no later than 5/7/03.

05/07/03

1288231 - motion
Motion to Dismiss filed by Defendant Michael J. Brillon on disputes 1-4. Motion to Dismiss given to judge.

05/12/03

1289160 - motreact
Motion to Dismiss see Order by Judge Judge David T. Suntag.

1289161 - note
Note: See entry in docket 382-4-03 Bncr.
1289377 - document
2 documents filed by Attorney Brian Marthage for party 2: State's Response to Defendant's Motion; to Dismiss.

05/13/03

1289163 - hrgset
Motion Hearing set for 07/21/03 at 09:00 AM. Motion to Dismiss and proceed without Counsel.

07/21/03

1316289 - hrgcan
Motion Hearing scheduled for 07/21/03 continued.
1316291 - note
Note: Hearing not held. New atty not available until 8/1/03. Set same time as case with public defender.
1316298 - hrgset
Motion Hearing set for 08/11/03 at 11:30 AM.

08/01/03

1316297 - pdasg
Attorney assigned: Kathleen M. Moore.

08/11/03

1325000 - hrgheld
Status Conference held by David T. Suntag. (WD).
1325001 - entorder
Entry Order: Set for status in 30 days with all other dockets.

08/26/03

1330728 - hrgset
Status Conference set for 09/08/03 at 09:00 AM.
1330778 - note

Note: Faxed transport to BCSD.

09/08/03

1334536 - hrgheld

Status Conference held by David T. Suntag. (WD).

1334557 - entorder

Entry Order: All pending defense motions are withdrawn. State and defense to advise Court by 11-7-03 as to which motions remain active. State and defense to respond by 11-21-03. Status 11/17/03. TRANSPORT DEFENDANT.

1334565 - hrgset

Status Conference set for 11/17/03 at 9:00 AM.

10/22/03

1351710 - motion

Motion to Transfer Defendant to MVCC filed by Attorney Kathleen M. Moore for Defendant Michael J. Brillon on disputes 1-4. Motion to Transfer Defendant to MVCC given to judge.

1355065 - document

2 documents filed for party : DOC's Response to Motion to Transfer the; Defendant to MVCC.

10/27/03

1353440 - hrgcan

Status Conference scheduled for 11/17/03 rescheduled.

1353442 - hrgset

Status Conference set for 11/03/03 at 09:00 AM. Rescheduled from November 17, 2003.

10/28/03

1354222 - entorder

Entry Order: Hold for response from DOC, if any, until 11/3/03. Motion 13.

1354734 - hrgcan

Status Conference scheduled for 11/03/03 rescheduled.

1354735 - hrgset

Status Conference set for 12/08/03 at 09:30 AM. Rescheduled from 11/17/2003.

1354807 - hrgcan

Status Conference scheduled for 12/08/03 rescheduled.

1354808 - hrgset

Status Conference set for 12/08/03 at 10:00 AM. Rescheduled from 11/17/2003.

11/03/03

1357288 - motion

Motion to Extend Deadlines filed by Attorney Kathleen M. Moore for Defendant Michael J. Brillon on disputes 1-4. Motion to Extend Deadlines given to judge.

1357475 - motdisp

Motion 14 (to Extend Deadlines) granted by David T. Suntag. Leave all cases on for 12/8/03 status.

11/05/03

1358713 - motion

Motion to Extend Motion Deadlines filed by Attorney Kathleen M. Moore for Defendant Michael J. Brillon on disputes 1-4. Motion to Extend Motion Deadlines given to judge.

11/07/03

1359263 - motdisp

Motion 15 (to Extend Motion Deadlines) granted by David T. Suntag. Per stip.

1359264 - hrgcan

Status Conference scheduled for 12/08/03 continued.

11/14/03

1361672 - motdisp
Motion 13 (To Transfer Defendant to MVCC) rendered moot by David T. Suntag. Per DOC response.

12/08/03 .

02/11/04

1393148 - motion
Motion to Extend Deadlines filed by Attorney Kathleen M. Moore for Defendant Michael J. Brillon on disputes 1-4. Motion to Extend Deadlines given to judge.

02/12/04

1395076 - motdisp
Motion 16 (to Extend Deadlines) granted by David T. Suntag.
1395077 - entorder
Entry Order: Stip.

02/23/04

1396848 - motion
Motion in Limine filed by Attorney Kathleen M. Moore for Defendant Michael J. Brillon on disputes 1-4. Motion in Limine given to judge.
1398209 - motreact
Motion in Limine see Order by Judge Judge David T. Suntag.
1398211 - entorder
Entry Order: State response by 3/12/04.

03/15/04

1405858 - document
2 documents filed by Attorney Brian Marthage for party 2: State's Response to Defendant's Motion; to Dismiss.
1405860 - motion

Motion to Extend Response Date filed by Attorney Brian Marthage for Plaintiff State on disputes 1-4. Motion to Extend Response Date given to judge.

1418343 - motdisp

Motion 18 (to Extend Response Date) entered in error by David T. Suntag. Should be entered in Docket 928-7-00.

04/06/04

1415264 - hrgset

Status Conference set for 04/26/04 at 3:30 PM. Status conferences only at this time. No hearing pending Motions. TRANSPORT ORDER ISSUED.

04/14/04

1418333 - hrgcan

Status Conference scheduled for 04/26/04 corrected.

1418334 - hrgset

Status Conference set for 04/26/04 at 03:30 PM. Status conference only. Motions hearing will not be held. TRANSPORT ORDER PREVIOUSLY ISSUED.

04/19/04

1419484 - motdisp

Motion 11 (to Dismiss for Lack of Prima Facie) denied; Motion 12 (to Dismiss) denied by David T. Suntag. See Judge Suntag's Entry Order dated 4/19/04.

04/26/04

1423652 - hrgheld

Status Conference held by David T. Suntag. (WD).

1423653 - entorder

Entry Order: Plea agreements are cut off. Defendant requests a jury trial in this docket first. All counts are joined for trial. Marie Salem, 3rd party atty, entered as party/participant 3.
1423670 - motion
Motion to Order DOC to Maintain Def. in MVRCF filed by Attorney Kathleen M. Moore for Defendant Michael J. Brillon on disputes 1-4. Motion to Order DOC to Maintain Def. in MVRCF given to judge.
1423671 - entorder
Entry Order: DOC through Marie Salem to respond to Motion to Order DOC to Maintain Defendant in MVRCF by 5-10-04. Defense to file any additional authority for motion with in ten days.
1423691 - chgdisp
Dispute 4: Dismissed by state. Judgment of No judgment entered by Judge David T. Suntag on dispute 4.
1423692 - entorder
Entry Order: 1. State to provide an updated witness list with addresses to defense within 2 weeks. 2. State to notify defense whether there is a tape or transcript of the depositions of witness Phillips within 2 weeks. 3. Any motions to bifurcate must be filed by 5/24/04. State response due 6/1/04. 4. Defense to file packet of motions in limine/Rule 26 notices applicable to this document by 5/24/04. State to respond by 6/1/04. 5. Final pre-trial to be held on 6/14/04 at 9:00 a.m. with Pick and Go Jury starting @ 10:00 a.m. on 6/14/04. 6. All counts

joined for trial.
1423693 - hrgset
Pre Trial Conference set for 06/14/04 at 09:00 AM.
1423694 - hrgset
Jury Drawing set for 06/14/04 at 10:00 AM.
1423695 - hrgset
Jury Trial set for 06/15/04 at 09:00 AM.
1423696 - hrgset
Jury Trial set for 06/16/04 at 09:00 AM.
1423697 - hrgset
Jury Trial set for 06/17/04 at 09:00 AM.
1423710 - motion
Motion to Compel Discovery filed by Attorney Kathleen M. Moore for Defendant Michael J. Brillon on disputes 1-3. Motion to Compel Discovery order issued by.
1423711 - motdisp
Motion 20 (to Compel Discovery) order issued by by David T. Suntag. Parties notified on the record. See Entry Order of even date re: discovery.

05/03/04

1426902 - note
Note: DOC legal dept. called - they are mailing response to motion filed by def. counsel.

05/06/04

1428117 - document
2 documents filed for party : DOC's Response to Motion to Order DOC to; Maintain Defendant in Rutland.

05/07/04

1428726 - document
1 document filed by Attorney Brian Marthage

for party 2: State's Response to Motions to Compel.

1428730 - document

1 document filed by Attorney Brian Marthage for party 2: Supplemental Rule 16 Disclosure.

05/12/04

1431190 - motdisp

Motion 19 (to Order DOC to Maintain Def. in MVRCF) denied by David T. Suntag.

1431191 - entorder

Entry Order: Defense has provided no authority for Court to order DOC where to house defendant.

05/24/04

1434672 - motion

Motion to Continue Deadlines filed by Attorney Kathleen M. Moore for Defendant Michael J. Brillon on disputes 1-3. Motion to Continue Deadlines given to judge.

05/26/04

1436973 - document

2 documents filed by Attorney Kathleen M. Moore for party 1: Defendant's First Objection to State's; Rule 26 Notices.

1436974 - document

2 documents filed by Attorney Kathleen M. Moore for party 1: Defendant's Second Objection to State's; Rule 26 Notices.

1436975 - document

2 documents filed by Attorney Kathleen M. Moore for party 1: Defendant's Third Objection to State's; Rule 26 Notices.

1436976 - motion

Motion to Bifurcate filed by Attorney Kathleen

M. Moore for Defendant Michael J. Brillon on disputes 1-4. Motion to Bifurcate given to judge.

1436977 - document

2 documents filed by Attorney Kathleen M. Moore for party 1: Defendant's Response to State's Motion; In Limine.

1436978 - motion

Motion in Limine filed by Attorney Kathleen M. Moore for Defendant Michael J. Brillon on disputes 1-4. Motion in Limine given to judge.

1436979 - document

1 document filed by Attorney Kathleen M. Moore for party 1: First Rule 26 Notice.

05/27/04

1436787 - motdisp

Motion 21 (to Continue Deadlines) granted by David T. Suntag.

1439370 - motreact

Motion to Bifurcate see Order by Judge Judge David T. Suntag.

1439372 - entorder

Entry Order: Response due by 6/4/04.

05/28/04

1437514 - document

2 documents filed by Attorney Kathleen M. Moore for party 1: Defendant's First Objection to State's; Rule 26 Notices.

1437515 - document

2 documents filed by Attorney Kathleen M. Moore for party 1: Defendant's Second Objection to State's; Rule 26 Notices.

1437516 - document

2 documents filed by Attorney Kathleen M.

Moore for party 1: Defendant's Third Objection to State's; Rule 26 Notices.

1437517 - document

1 document filed by Attorney Kathleen M. Moore for party 1: Defendant's Motion to Bifurcate.

1437518 - document

2 documents filed by Attorney Kathleen M. Moore for party 1: Defendant's Response to State's Motion; In Limine.

1437519 - document

1 document filed by Attorney Kathleen M. Moore for party 1: Defendant's First Motion in Limine.

1437520 - document

1 document filed by Attorney Kathleen M. Moore for party 1: Defendant's First Rule 26 Notice.

06/04/04

1439911 - entorder

Entry Order: Objections and requests to be filed in writing by 4:30pm on 6/11/04. Will be considered at pretrial before jury draw on 6/14/04.

06/07/04

1440496 - motmemo

Memorandum in Opposition to Motion to Bifurcate filed by Attorney Brian Marthage for Plaintiff State.

06/11/04

1441403 - document

2 documents filed by Attorney Kathleen M. Moore for party 1: Defendant's Objections to Preliminary; Instructions and First Request to

Charge.
1441404 - document
1 document filed by Attorney Kathleen M. Moore for party 1: Defendant's Second Request to Charge.
1441405 - document
2 documents filed by Attorney Brian Marthage for party 2: State's Request for Preliminary; Instructions.
1441406 - document
2 documents filed by Attorney Brian Marthage for party 2: State's Reply to Defendant's Response; to State's Motion in Limine.
1441407 - document
1 document filed by Attorney Brian Marthage for party 2: State's Request for Judicial Notice.
06/14/04
1441608 - hrgheld
Pre Trial Conference held by David T. Suntag. (WD).
1441609 - hrgheld
Jury Drawing held by David T. Suntag. (WD).
1441622 - chgdisp
Dispute 2: Dismissed by state. Judgment of No judgment entered by Judge David T. Suntag on dispute 2.
1441642 - chgdisp
Dispute 2: Reopened. Judgment of No judgment entered by Judge David T. Suntag on dispute 2.
1441643 - chgdisp
Dispute 3: Dismissed by state. Judgment of No judgment entered by Judge David T. Suntag on dispute 3.
1441786 - motdisp

Motion 22 (to Bifurcate) denied by David T. Suntag. Parties notified on the record.
1441792 - entorder
Entry Order: Defendant's motion to sever is denied.
1442119 - jurdrawn
Jury drawn. DS/.
1443595 - hrgset
Court Trial set for 06/24/04 at 11:00 AM. Court trial on HO Enhancement on Count 1.

06/15/04

1442261 - hrgheld
Jury Trial held by David T. Suntag. (WM). Jury Sworn.
1442264 - motdisp
Motion 23 (in Limine) denied by David T. Suntag. Parties notified on the record.

06/16/04

1442673 - hrgheld
Jury Trial held by David T. Suntag. (WM).

06/17/04

1443193 - hrgheld
Jury Trial held by David T. Suntag. (WD).
1443476 - note
Note: Admitted exhibits brought into jury room.
1443578 - jurwaive
Right to jury trial waived. Waiver filed.
1443579 - note
Note: Waiving a jury trial as to HO.
1443582 - verdict
Trial verdict on dispute 1: guilty by jury.
1443584 - verdict
Trial verdict on dispute 2: guilty by jury.
1443586 - entorder

Entry Order: Finding June 28, 2004.

06/18/04

1443744 - hrgset

Court Trial set for 06/30/04 at 01:00 PM. Rescheduled from June 24, 2004.

1443745 - hrgcan

Court Trial scheduled for 06/24/04 rescheduled.

06/22/04

1445482 - note

Note: Returned the original depositions to the State of: Terry Tatro, Michelle Tatro, Diana Kittredge, Dorothy Powers, Kara Prouty, Peter McConnell, Michelle Tatro, Barbara Croft, William Collins, John Behan, Clayton Knapp and Chris Lauzon.

06/28/04

1448458 - motion

Motion for Judgment of Acquittal filed by Attorney Kathleen M. Moore for Defendant Michael J. Brillon on disputes 1-4. Motion for Judgment of Acquittal given to judge.

1448459 - motion

Motion for a New Trial filed by Attorney Kathleen M. Moore for Defendant Michael J. Brillon on dispute 1. Motion for a New Trial given to judge.

1448460 - motion

Motion to Dismiss-Renewed filed by Attorney Kathleen M. Moore for Defendant Michael J. Brillon on dispute 1. Motion to Dismiss-Renewed given to judge.

1448463 - motion

Motion to Withdraw Jury Waiver & Dismiss H/O filed by Attorney Kathleen M. Moore for

Defendant Michael J. Brillon on dispute 1. Motion to Withdraw Jury Waiver & Dismiss H/O given to judge.

06/30/04

1448818 - hrgheld

Court Trial held by David T. Suntag. (WM).

1448857 - entorder

Entry Order: Court trial held on prior felony conviction allegations for Habitual Offender Enhancement purposes: Findings and conclusion of Court placed orally on record at hearing. Court finds that State has proven beyond a reasonable doubt that defendant was, in fact, convicted of three prior felony level offenses: 1. Sexual Assault on a Minor, judgement entered April 22, 1994, in violation of 13 V.S.A. 3251(3); Felony level Aiding in the Concealment of Stolen Property, judgement entered November 8, 1982, in violation of 13 V.S.A. Sec.2561;and Obstruction of Justice, judgement entered October 6, 1981, in violation of 13 V.S.A. Sec 3015. ORDER: State will advise defense counsel by July 8, 2004, whether it intends to introduce any evidence at the sentencing hearing which relates to other pending criminal charges against the defendant. Defense will have until July 28, 2004 to file any request for relief, generally ("Begins" immunity request, etc.) 2. Court orders PSI to be completed within 30 days. Department of Corrections is advised that they may not interview the defendant without the presence of his attorney unless she and defendant agree so. 3.State will notify defense of all facts it intends

to introduce at the sentencing hearing which are not contained in the PSI, within 10 days of receipt of the PSI. Defense will have ten days after receipt of State's notice to file any and all objections to factual contents of PSI and/or State's evidence otherwise noticed, pursuant to V.R.Cr.P. 32(A)(4). 4. Court will set a one day hearing to hear and decide all post-trial motions, to which State must respond within two weeks of today and to hear and determine issues related to defendant's objection to facts contained in the PSI and/or State's noticed sentencing evidence. 5. Court will set a two day sentencing hearing to take place after hearing ordered in paragraph 4 is complete.

1448876 - entorder

Entry Order: Defendant has been provided with a right to jury trial on his habitual offender charge and chose to knowingly and voluntarily waive that right orally and in writing. Blakely creates no additional right or remedy.

1451467 - motdisp

Motion 27 (to Withdraw Jury Waiver & Dismiss H/O) denied by David T. Suntag.

07/07/04

1451518 - note

Note: Entry orderd from 6/30/04 faxed to parties on 7/7/04.

1451524 - invest

Presentence investigation ordered by Judge David T. Suntag to be completed by Probation and Parole due 08/07/04. ATTORNEY MOORE TO BE PRESENT FOR INTERVIEWS WITH DEFENDANT. SENTENCING TO BE SET AT

A LATER DATE. COURT HEREBY ORDERS THAT PSI BE COMPLETED WITHIN 30 DAYS.

07/10/04

1452459 - document

5 documents filed by Attorney Kathleen M. Moore for party 1: Copy of E-mail from Brian Marthage to Kate Moore regarding State's intent to dismiss w/o prejudice other pending charges; against this Defendant and use all of; that information as sentencing material.

07/13/04

1454368 - hrgset

Other set for 08/26/04 at 09:00 AM. 1 day hearing regarding post trial motions.

1454402 - hrgset

Sentencing Hearing set for 10/20/04 at 09:00 AM. 2 Day Sentencing Hearing.

1454404 - hrgset

Sentencing Hearing set for 10/21/04 at 09:00 AM. 2 Day Sentencing Hearing.

07/20/04

1457764 - cstat - status set to apsn

Case status changed to Active - Ready for sentence.

07/21/04

1460672 - document

1 document filed by Attorney Kathleen M. Moore for party 1: Letter Re: dismissal of counts.

07/28/04

1461914 - motion

Motion Limit Sentencing Evidence and Information filed by Attorney Kathleen M.

Moore for Defendant Michael J. Brillon on disputes 1-2. Motion Limit Sentencing Evidence and Information given to judge.

08/02/04

1462390 - document

2 documents filed by Attorney Kathleen M. Moore for party 1: Request for copies of all PSIs ever; submitted on this Defendant.

08/06/04

1465653 - document

1 document filed for party : Pre sentence Investigation.

08/09/04

1466175 - document

3 documents filed by Attorney Brian Marthage for party 2: State's Response to Defendant's Motion; to Limit Sentencing Evidence and; Information.

08/19/04

1470656 - motdisp

Motion 28 (Limit Sentencing Evidence and Information) denied by David T. Suntag. Should State not dismiss other pending criminal charges with prejudice before sentencing commences and nevertheless introduces evidence of those other pending matters, defendant will be entitled to Begins immunity at sentencing.

08/23/04

1471598 - document

2 documents filed by Attorney Brian Marthage for party 2: State's Response to Defendant's; Post-Trial Motions.

1471599 - document

1 document filed by Attorney Brian Marthage for party 2: Sentencing Disclosure.

08/24/04

1471969 - entorder

Entry Order: Since the defense has not had ten days from filing of the State's disclosure of sentencing information to respond before the August 26th hearing, the hearing will be solely directed to post-trial motions and objections, if any, to the contents of the PSI. Objections to the remaining disclosures by the State (the so-called Fatico hearing) will commence at the beginning of the scheduled 2 day sentencing hearing. Court will attempt to complete the Fatico hearing and the sentencing hearing in those 2 days. If time to complete the sentencing is needed, the court will schedule additional time to complete the hearing. The 8/26 hearing will commence at 9:00 and 1 hour will be allotted.

08/25/04

1472049 - motion

Motion to Continue filed by Attorney Kathleen M. Moore for Defendant Michael J. Brillon on disputes 1-4. Motion to Continue given to judge.

1472278 - hrgheld

Other held by David T. Suntag. (WM).

1472281 - hrgset

Motion Hearing set for 08/25/04 at 01:00 PM.

1472283 - hrgheld

Motion Hearing held by David T. Suntag. (WM).

1472382 - motdisp

Motion 29 (to Continue) granted by David T. Suntag. Parties notified on the record.

1472383 - document
2 documents filed by Attorney Brian Marthage for party 2: State's Response to Defendant's Motion; to Continue.
1473435 - motmemo
Memorandum in Opposition to Motion to Continue filed by Attorney Brian Marthage for Plaintiff State.

08/26/04

1473244 - entorder
Entry Order: Hearing held- 8/25/04: Defendant's motion to continue 8/26/04 hearing. Atty Moore present by phone. Atty Hunter present in court. Atty Moore filed motion to continue 8/26/04 hearing due to receipt of State's sentencing information too late to have ten days to respond as previously ordered. In fact, packet of State's proposed sentencing information was received by court on 8/23/04. Court initially advised that 8/26/04 hearing would therefore, be limited to post-trial motions and objections to PSI facts. At hearing, defense counsel requested, State agreed as did court that 8/26/04 hearing should be continued as information necessary for presenting defense arguments on post-trial motions were not yet complete. Per agreement court ordered: 8/26/04 hearing is continued. Order: court will attempt to find one day to reschedule hearing prior to sentencing hearings now scheduled for two days in late October. If one day is not available, court will attempt to schedule a two hour post-trial motion hearing ONLY prior to the October sentencing hearings. No hearings will be scheduled until after

September 22. If one day sentencing information objections (fatico) hearing cannot be set prior to sentencing dates now scheduled, per agreement of counsel on the record: First day of sentencing hearing will involve any objections to factual content of PSI and other sentencing information which the State intends to present, as contained in their disclosure of 8/23/04. Any objections to facts contained in PSI or additional information submitted on 8/23/04, must be filed by counsel no later than 7 days prior to FATICO hearing. If not set before now scheduled sentencing hearing, such objections must be filed no later than October 12. Should court rule that any such evidence subject to objection is, nevertheless, reliable for sentencing purposes, parties do not need to present that evidence anew for sentencing purposes. Rather court will then accept what was presented at FATICO hearing.

08/30/04

1474093 - hrgset
Motion Hearing set for 10/06/04 at 01:30 PM. All pending motions.

10/06/04

1490621 - document
3 documents filed by Attorney Kathleen M. Moore for party 1: Defendant's Supplemental Memorandum in; Support of Motion for Judgment of; Acquittal, Count 1.
1490690 - hrgheld
Motion Hearing held by David T. Suntag. (WD).
1490706 - entorder
Entry Order: State has until 10/13/04 to file

supplemental memorandum in response to new memorandum as well as transcripts.

10/11/04

1491928 - motion

Motion Renewed Motion to Dismiss filed by Attorney Kathleen M. Moore for Defendant Michael J. Brillon on disputes 1-4. Motion Renewed Motion to Dismiss given to judge.

10/12/04

1492387 - motion

Motion Objections to PSI & Other Info filed by Attorney Kathleen M. Moore for Defendant Michael J. Brillon on disputes 1-4. Motion Objections to PSI & Other Info given to judge.

1492388 - motion

Motion Second Motion for New Trial & MTD filed by Attorney Kathleen M. Moore for Defendant Michael J. Brillon on disputes 1-4. Motion Second Motion for New Trial & MTD given to judge.

1492389 - motion

Motion to Continue Sentencing filed by Attorney Kathleen M. Moore for Defendant Michael J. Brillon on disputes 1-4. Motion to Continue Sentencing given to judge.

1492391 - motreact

Motion Objections to PSI & Other Info to wait for Memo in Opposition Judge David T. Suntag.

10/13/04

1492650 - motmemo

Memorandum in Opposition to Motion Renewed Motion to Dismiss filed by Attorney Brian Marthage for Plaintiff State.

1492651 - motmemo

Memorandum in Opposition to Motion Objections to PSI & Other Info filed by Attorney Brian Marthage for Plaintiff State.

1492652 - motmemo

Memorandum in Opposition to Motion Second Motion for New Trial & MTD filed by Attorney Brian Marthage for Plaintiff State.

1492653 - motmemo

Memorandum in Opposition to Motion to Continue Sentencing filed by Attorney Brian Marthage for Plaintiff State.

10/14/04

1492987 - motdisp

Motion 33 (to Continue Sentencing) denied by David T. Suntag.

1492988 - entorder

Entry Order: Defendant seeks to continue a sentencing hearing scheduled for October 20 and 21, 2004. The State opposes the motion. Defendant argues that transcripts ordered to present in support of various post-trial motions contained notations of inaudible testimony. Defendant argues that the defective nature of such transcripts will hinder the Court in determining his motions. The only specific metioned concerns the testimony of Michelle Tatro to which the defendant argues that the Court will be unable to assess her credibility without the full transcript. This judge was present during the jury trial as were both the Deputy State's Attorney and the defense counsel. To the extent that the credibility of Ms. Tatro will bear on any pending motion, the Court will be able to assess that matter as it

does in most every case, by referring to the Court's own notes of the trial, hearing argument from counsel about her testimony. If it appears that a particular portion of her testimony is critical for the Court's decision on a motion pending, the Court, as could counsel, could listen to the tape itself. The Court notes, however, that counsel has not provided any information as to when a better transcript will be available or even if such could be created. More importantly, counsel points to nothing specific about some section of Ms. Tatro's testimony now noted as inaudible by a transcriptionist which could or would have any impact on a pending motion. Defendant points to nothing which can be considered probative concerning a pending motion. This case has been pending for over three years and the defendant remains incarcerated awaiting the conclusion of the case. Despite counsel's representation that her client agrees to further delay, absent a sufficient basis for further delay, the Court does not. Motion to continue the sentencing hearing is DENIED.

10/18/04

1493646 - motion

Motion Renewed Motion to Continue Sent. filed by Attorney Kathleen M. Moore for Defendant Michael J. Brillon on disputes 1-4. Motion Renewed Motion to Continue Sent. given to judge.

1494377 - motion

Motion to Continue & Acknowledgement filed by Attorney Kathleen M. Moore for Defendant

Michael J. Brillon on disputes 1-4. Motion to Continue & Acknowledgement given to judge.
1494382 - motreact
Motion Renewed Motion to Continue Sent. see Order by Judge Judge David T. Suntag.
1494383 - entorder
Entry Order: Counsel informed on record-court will grant motion if defendant signs request to continue with understanding that sentencing will not be able, therefore, to take place until end of January 2005.
1494391 - motdisp
Motion 35 (to Continue & Acknowledgement) granted by David T. Suntag. Per prior Order of 10/18/2004.
1494394 - hrgset
Sentencing Hearing set for 01/20/05 at 09:15 AM. Rescheduled from 10/20-21/2004.
1494398 - hrgset
Sentencing Hearing set for 01/21/05 at 09:15 AM. Rescheduled from 10/20-21/2004.

10/19/04

1494457 - hrgcan
Sentencing Hearing scheduled for 10/20/04 cancelled due to attorney unavailability.
1494458 - hrgcan
Sentencing Hearing scheduled for 10/21/04 cancelled due to attorney unavailability.

12/16/04

1516848 - entorder
Entry Order: Deadlines for filing of transcripts relevant to the disposition of Defendant's post-trial motions.

12/30/04

1520796 - document
5 documents filed by Attorney Kathleen M. Moore for party 1: Defendant's Supplemental Memorandum in; Support of Renewed Motion to Dismiss for; Lack of Speedy Trial and in the interest; of Justice, or in the Alternative, for; Release Pending Resolution.
1520800 - document
2 documents filed by Attorney Kathleen M. Moore for party 1: Defendant's Supplemental Memorandum in; Support of Motion for New Trial.
1520801 - document
1 document filed by Attorney Kathleen M. Moore for party 1: Attachments and Revised Trial Transcript.

01/18/05

1526862 - motion
Motion to Issue Transport Order filed by Attorney Kathleen M. Moore for Defendant Michael J. Brillon on disputes 1-4. Motion to Issue Transport Order given to judge.
1526975 - motdisp
Motion 36 (to Issue Transport Order) granted by David T. Suntag. Transport Order issued for Jesse Weller.
1527085 - motdisp
Motion 24 (for Judgment of Acquittal) denied by David T. Suntag. See separate Entry Order of even date.
1527086 - note
Note: Faxed Entry Order for Motion 24 to parties.

01/19/05

1526979 - motdisp
Motion 30 (Renewed Motion to Dismiss) denied by David T. Suntag. See Judge Suntag's Entry Order dated and filed 01/19/05.
1526980 - motdisp
Motion 26 (to Dismiss-Renewed) denied by David T. Suntag. See Judge Suntag's Entry Order dated and filed 1/19/05.
1526981 - motdisp
Motion 25 (for a New Trial) denied by David T. Suntag. See Judge Suntag's separate Entry Order dated and filed 1/19/05.
1526982 - motdisp
Motion 32 (Second Motion for New Trial & MTD) denied by David T. Suntag. See Judge Suntag's separate Entry Order dated and filed 1/19/05.
1526983 - note
Note: Both of Judge Suntag's Entry Orders issued on 1/19/2005 faxed to SA and K. Moore.

01/20/05

1527605 - hrgheld
Sentencing Hearing held by David T. Suntag. (WM).

01/21/05

1528076 - hrgheld
Sentencing Hearing held by David T. Suntag. (WM).
1528079 - entorder
Entry Order: Defendant is ill. Reschedule sentencing.
1528144 - hrgset
Sentencing Hearing set for 02/10/05 at 09:15 AM. Continued from 1/21/05 due to Defendant's

illness.

02/01/05

1533807 - document

1 document filed by Attorney Kathleen M. Moore for party 1: Letter to State requesting discovery.

02/09/05

1535703 - hrgcan

Sentencing Hearing scheduled for 02/10/05 cancelled due to court schedule.

1535755 - hrgset

Sentencing Hearing set for 03/23/05 at 09:15 AM. Rescheduled from 2/10/05. Will transport Jesse Weller at Defendant's Request.

03/23/05

1550720 - hrgheld

Sentencing Hearing held by David T. Suntag. (KP).

1551015 - sentence

Sentence on dispute 1: to serve 12 year(s) to 20 year(s)

1551015 - sentence

to start on 03/23/05 per Judge David T. Suntag. Credit for time served. $20.50sc for each count to be paid to DOC. Sentencing Mittimus to Commissioner of Corrections issued. Concurrent Ct. 2. $20.50 surcharge assessed.

1551016 - jailmitt

1551017 - chgdisp

Dispute 1: Verdict by jury of guilty. Judgment of Guilty entered by Judge David T. Suntag on dispute 1.

1551018 - sentence

Sentence on dispute 2: to serve 0 to 6 month(s)
1551018 - sentence
to start on 03/23/05 per Judge David T. Suntag. Credit for time served. Sentencing Mittimus to Commissioner of Corrections issued. Concurrent Ct. 1. $20.50 surcharge assessed.
1551019 - jailmitt
.
1551020 - chgdisp
Dispute 2: Verdict by jury of guilty. Judgment of Guilty entered by Judge David T. Suntag on dispute 2.
1551021 - close - status set to dis
Case closed.
1551022 - motdisp
Motion 2 (Final Fel.Pre-Trial and Feb. Trial List) rendered moot; Motion 5 (In Limine) rendered moot; Motion 8 (Dismiss Assigned Counsel) rendered moot; Motion 9 (To Dismiss & Replace Ct. Assg. Atty) rendered moot; Motion 17 (in Limine) rendered moot; Motion 20 (to Compel Discovery) rendered moot; Motion 31 (Objections to PSI & Other Info) rendered moot.
04/18/05 Notice of Appeal from party 1.
1560800 - note
Note: Sent Notice of Appeal and Docket Entries to VSC. Sent copies w/ PD App & Trans. Order Form to Kate Moore w/ copy to SA.
1561041 - note
Note: 3" binder and 2 manilla envelopes were retained by Bennington District Court and are located in the Appeals drawer awaiting either request from VSC to send them along, or return of the file.

04/25/05

1563411 - note

Note: VSC Docket No. 2005-167 assigned. Public Defender requested.

1563415 - pdasg

Attorney assigned: Public Defender PD.

1563416 - note

Note: No ability to pay Co-Pay for PD.

06/20/05

1584391 - motion

Motion to Reconsider Sentence filed by Attorney Public Defender PD for Defendant Michael J. Brillon on disputes 1-2. Motion to Reconsider Sentence given to judge.

06/22/05

1585494 - motreact

Motion to Reconsider Sentence see Order by Judge Judge David T. Suntag.

1585495 - entorder

Entry Order: Response to be filed by 7/15/05.

06/28/05

1588372 - motmemo

Memorandum in Opposition to Motion to Reconsider Sentence filed by Attorney Brian Marthage for Plaintiff State.

1588375 - document

2 documents filed by Attorney Brian Marthage for party 2: State's Supplemental Opposition to Motion to Reconsider Sentence.

06/30/05

1589205 - motreact

Motion to Reconsider Sentence see Order by Judge Judge David T. Suntag.

1589206 - entorder

Entry Order: Case is on appeal at VT Supreme Court absent authority provided by counsel to the contrary within 2 weeks. Trial court no longer has jurisdiction to consider motion until such time as Supreme Court decides appeal.

07/31/06

1727707 - entorder

Entry Order: In light of the stipulation of the parties, defendant's sentence in Ct. 1 of Docket No. 957-7-01 Bncr is vacated, and the case is remanded to the Bennington District Court for resentencing pursuant to the parties' stipulation.

1761292 - chgdisp - status set to apsn

Dispute 1: Reopened. Judgment of No judgment entered by Judge Supreme Court on dispute 1.

1761296 - reopen

Case reopened: Returned from higher court, remanded on dispute 1.

08/03/06

1727709 - hrgset

Status Conference set for 08/10/06 at 3:30 PM.

1727737 - hrgcan

Status Conference scheduled for 08/10/06 continued.

1727738 - hrgset

Status Conference set for 08/28/06 at 10:30 AM.

08/08/06

1729979 - pdasg

Attorney assigned: Kathleen M. Moore.

08/09/06

1730126 - entorder

Entry Order: We previously ordered that this case be remanded pursuant to a stipulation of

the parties. We now withdraw that order, and order that the sentence be vacated and the case is remanded to the Bennington District Court for reconsideration of sentence.

1730400 - cstat - status set to dpju

Case status changed to Disposed - Post Judgment.

1730402 - entorder

Entry Order: Reconsideration of the sentence is w/i the trial court's discretion. Counsel shall file motion for reconsideration of this sentence with this court w/i 2 weeks of receipt of this order.

1730403 - hrgcan

Status Conference scheduled for 08/28/06 cancelled.

1730410 - couappr

Appearance entered by William D. Wright.

08/10/06

1730642 - pdasg

Attorney assigned: William A. Nelson. Kathleen M. Moore, 3rd party atty. entered as party/participant 4.

08/24/06 David E. Tartter, Co-counsel for Plaintiff, entered as party/participant 5.

1735500 - document

1 document filed for party 5: Memo re: Sentence Reconsideration.

1735501 - motmemo

Memorandum in Opposition to Motion to Reconsider Sentence filed by Co-counsel for Plaintiff David E. Tartter.

08/25/06

1735859 - document

2 documents filed by Attorney William A. Nelson for party 1: Defendant's Response to Court's Order of August 9, 2006.

1735862 - motmemo

Memorandum in Opposition to Motion to Reconsider Sentence filed by Attorney William A. Nelson for Defendant Michael J. Brillon.

09/05/06

1739605 - entorder

Entry Order: Motion to reinstate 7/27/06 entry order is denied. The case is remanded to the Bennington District Court for reconsideration of defendant's sentence.

09/06/06

1739840 - motreact

Motion to Reconsider Sentence to wait for Memo in Opposition Judge David T. Suntag.

1739842 - entorder

Entry Order: In consideration of the 9/5/06 Entry Order of the Supreme Court, no later than 9/20/06, the parties shall file motion for reconsideration of sentence detailing any and all grounds upon which such reconsideration is requested. The Court will determine whether hearing is equied after all filings are complete.

09/19/06

1744693 - document

2 documents filed by Attorney William A. Nelson for party 1: Sentencing Memorandum and Request for Status Conference.

1744695 - motion

Motion Request for Status Conference filed by Attorney William A. Nelson for Defendant Michael J. Brillon on disputes 1-2. Motion

Request for Status Conference given to judge.

09/20/06

1745045 - motreact

Motion Request for Status Conference see Order by Judge Judge David T. Suntag.

1745046 - entorder

Entry Order: Counsel suggests that both the Bennington State's Attorney and the Attorney General are in agreement with the re-sentencing. Court has yet to see any input from the State's Attorney. Court would appreciate State's Attorney's input by 09/29/06.

09/22/06

1747017 - note

Note: Files returned from VSC.

09/29/06

1749164 - document

2 documents filed by Attorney William D. Wright for party 2: State's Response to Defendant's Motion; to Reconsider Sentence.

10/02/06

1749498 - hrgset

Status Conference set for 10/09/06 at 10:00 AM. Telephone Status before Judge Suntag. Counsel only.

10/09/06

1751532 - hrgheld

Status Conference held by David T. Suntag. (TAPE).

1752112 - entorder

Entry Order: Entry Order re: next hearing and date for response due by 10/23/2006. See order in file.

1752113 - note

Note: Faxed 10/9/06 Entry Order to Wright, Tartter, Moore & Nelson.

10/13/06

1753938 - document

1 document filed by Attorney William A. Nelson for party 1: Letter waiving defendant's appearance.

10/24/06

1757348 - motdisp

Mction 37 (to Reconsider Sentence) order issued by David T. Suntag. see entry order in file.

11/06/06

1761255 - note

Note: Case sent back to Supreme Court so appeal can continue.

1761301 - cstat - status set to dap

Case status changed to Disposed - Appeal Pending.

04/25/08

1952007 - entorder

Entry Order: Order certifying decision faxed to the Court today.

06/05/08

1969577 - cstat - status set to dis

Case status changed to Disposed.

1969733 - motion - status set to dpju

Motion to Permit Copying of PSI filed by Probation Officer Daniel Charron on disputes 1-4. Motion to Permit Copying of PSI given to judge.

1969734 - couappr

Appearance entered by Erica Marthage. Daniel Charron, Probation Officer, entered as party/participant 6.

06/10/08

1971282 - motreact

Motion to Permit Copying of PSI see Order by Judge Judge Katherine A. Hayes

1971283 - entorder

Entry Order: The defendant is requested to notify the court of any objection within 2 wks.

06/23/08

1977134 - document

1 document filed by Attorney William A. Nelson for party 1: Letter requesting extension.

1977136 - motion

Motion to Extend Deadline filed by Attorney William A. Nelson for Defendant Michael J. Brillon on disputes 1-4. Motion to Extend Deadline given to judge.

1977137 - motdisp

Motion 40 (to Extend Deadline) granted by Katherine A. Hayes. Deadline extended for 2 additional weeks to July 7, 2008.

07/01/08

1980420 - motmemo

Memorandum in Opposition to Motion to Permit Copying of PSI filed by Attorney William A. Nelson for Defendant Michael J. Brillon.

07/03/08

1981108 - motreact

Motion to Permit Copying of PSI to wait for Memo in Opposition Judge Katherine A. Hayes.

1981109 - entorder

Entry Order: As to DOC's Motion to Permit copying of the PSI and the defendant's objection thereto. State is requested to submit a memorandum setting forth any basis for

disclosure that is consistent with 28 V.S.A. Sec. 204(d). Any such memo should be submitted within 2 weeks.

08/06/08

1996423 - motdisp
Motion 39 (to Permit Copying of PSI) denied by Katherine A. Hayes.
1996425 - entorder
Entry Order: The motion is denied based on the defendant's objections and the State's failure to file any explanation of an applicable exception to 28 VSA 204(d)'s restrictions on disclosure.
1996433 - close - status set to dis
Case closed.
1996434 - motdisp
Motion 37 (to Reconsider Sentence) rendered moot; Motion 38 (Request for Status Conference) rendered moot.

IN THE SUPREME COURT OF THE STATE OF VERMONT
DOCKET NO. 2005-167

STATE OF VERMONT, APPELLEE

V.

MICHAEL BRILLON, APPELLANT

APPEAL FROM THE

DISTRICT COURT OF VERMONT
UNIT II, BENNINGTON CIRCUIT
DOCKET NO. 957-7-01 BNCR

APPELLEE STATE OF VERMONT'S BRIEF

STATE OF VERMONT
WILLIAM H. SORRELL
ATTORNEY GENERAL

By: DAVID TARTTER
Assistant Attorney General
109 State Street
Montpelier VT 05609-1001

[Excerpt of Appellee's Brief, Pages 17 through 29]

* * * * * * * *

III.

THE DEFENDANT WAS NOT DENIED HIS RIGHT TO A SPEEDY TRIAL

The defendant argues that he was denied his right to a speedy trial, and therefore that his conviction should be reversed and the charge dismissed.

The legal standard for determining whether this right has been violated is well-established. As this Court has often held, a determination whether the right to a speedy trial has been denied is based upon a balancing of four factors: the length of the delay, the reason for the delay, the defendant's efforts at obtaining a speedy trial, and the prejudice to the defendant. State v. Keith, 160 Vt. 257, 267 (1993). Of these, prejudice to the defendant at trial is the most important consideration, and, "[w]here there is no prejudice to the defense at trial, a speedy-trial claim cannot prevail." State v. Turgeon, 165 Vt. 28, 35 (1996). In this case, a proper balancing of the four factors demonstrates that the defendant's claim is without merit.

A. Length of Delay.

The first factor is the length of the delay, determined without reference to causes for the delay.

A significant period will trigger a review of the remaining three factors. Turgeon, supra. The defendant in this case was arrested on July 27, 2001, and held without bail until trial began on June 14, 2004. This period of almost three years is sufficient to trigger further inquiry into the remaining factors.

B. Reasons for the Delay.

1. Procedural History

The procedural history of this case is complex, but a close examination reveals that much of the delay was attributable to the defendant himself. This brief will first outline the procedural history, then discuss which periods of time must be attributed to the defendant and which to the State.

a. The Recusal Motion, August 10, 2001 – November 20, 2001.

After his arrest on July 27, 2001, and the filing of the charge and no-bail order on July 30, 2001, an evidentiary hearing was convened on the bail issue for October 2, 2001. Before the hearing began, however, defense counsel asked that the hearing be continued indefinitely, indicating that he intended to file a motion to recuse Judge Karen Carroll. Defense counsel noted that the motion would toll the time for a speedy trial calculation. The basis of the motion was the defendant's claim that Judge Carroll was biased against him, and the defendant specifically noted a letter he had written to Judge Carroll to this effect on August 10, 2001. The defendant argued that the

judge's receipt of the letter from him was itself grounds for disqualification, as it would bias her against him. P.C., pp 25-26. The trial court granted the motion to continue, noting that the letter cited as grounds for recusal had been in the defendant's possession for almost two months. 10/2/01. The recusal motion was filed the following day, and specifically noted that the motion "will also operate to toll any time calculation for speedy trial purposes." P.C. p. 23.

The trial court denied the motion to recuse on October 9, 2001, and referred the matter to the Administrative Judge. The Administrative Judge held a telephonic hearing on the motion to recuse on October 23, 2001, and issued a written decision denying the motion on November 20, 2001. P.C., p. 25.

b. Motion to Continue and First Dismissal of Attorney, February 22 – June 10, 2002.

Following denial of the motion to recuse, depositions were held and trial was tentatively scheduled to begin in February. The defense objected to this trial date, arguing that further investigation was necessary in order to prepare for trial. P.C., p. 37. The trial court denied the motion and set the jury draw for February 26, 2002, with the trial to begin the next day. P.C., p. 3. On February 22, the defense again filed a motion to continue the trial, asserting that defense counsel's case load had prevented adequate preparation for trial, and also alluding to legal and ethical issues bearing on his continuing ability to represent the defendant. Defense counsel

represented to the court that the defendant was in agreement with the motion to continue and that defendant acknowledged that any resulting delays would not count as time calculated for speedy trial purposes. P.C., p. 45.

The defendant's motion to continue was heard on February 22, 2002. The court denied the motion to continue, following which the defendant stated, "You're fired, Rick." 2/22/02, p. 30. (Defense counsel was Richard Ammons).

On February 25, defense counsel filed a motion to withdraw, noting that his employment had been terminated by the defendant at the February 22 hearing. P.C., p. 50. A hearing was held on the motion the same day, at which time the court asked the defendant, "Do you understand that by requesting another attorney, your case with you being held without bail may be prolonged for four to six months we're talking about at this time?" The defendant answered, "yes." 2/25/02, p. 12. The court again asked him, "Are you willing to have the Court grant Mr. Ammons' motion and you wait for a new attorney to get fully familiar with your case, which, as I said, could take up to four to six months by the time the Court can get it back in here?" and the defendant replied, "Yes. I'm prepared to sit here. I would rather do it right the first time. There is only one shot at it." The court replied, "Okay," and the defendant said, "So the answer is yes." 2/25/02, pp. 12 – 13. The court granted the motion to withdraw. 2/25/02, p. 18.

Three days later, attorney Matthew Harnett

was assigned to the matter, and the next day, March 1, 2002, he was replaced by Gerard Altieri due to a conflict. P.C., p. 3. As the trial court had informed the defendant, Attorney Altieri proceeded to take several months to familiarize himself with the case and to prepare for trial. Altieri filed a notice of self-defense on April 2, 2002.

c. Second Dismissal of Attorney, June 11 – August 27, 2002.

On May 20, 2002, the defendant filed a motion to dismiss attorney Altieri, claiming that his work on the case had been insufficient. P.C., p. 60. The motion was heard on June 11, 2002. Attorney Altieri stated that he had read the depositions and met twice with the defendant and discussed with him the strengths and shortcomings of the case. He was under the impression that they had reached an agreement on how the case would be tried. 5/20/02, p. 5. The court discussed in great detail with both Attorney Altieri and the defendant the nature of the defendant's dissatisfaction. Towards the end of this discussion, Attorney Altieri indicated that during a break in the proceedings, the defendant had threatened him, saying "If it takes 20 years to get even with you, I will get you." Asked if he had said that to Attorney Altieri, the defendant replied, "That's not exactly what I said, sir." 5/20/02, pp. 25 – 26.

The trial court granted the motion to dismiss Attorney Altieri, finding that the attorney-client relationship had broken down irretrievably, but the court also indicated that the defendant's complaints

against his attorney were not merited:

> I do not have the power nor does any Judge have the power to direct the Legislature to open the purse strings to provide for a full cadre of appointed counsel sufficient to provide – even if this were required, and I want to make it clear to you that it's not required professionally but assuming that it was (inaudible) that I could find some professional obligation for an attorney to always return every phone call that his client made, to be at the client's instant beck and call to do every bit of copying that was required. To certify to the client that the attorney interviewed each and every witness that the client said might have something relevant to say about the case, assuming that was a professional responsibility and it is not but even assuming that it was, I would be powerless to provide, to order the assignment of counsel sufficient to be able to do that... I want to make something clear now so that we can be reminded if it comes up again. The Canons of Ethics make it very clear and your right to fair trial and your right to counsel also do not include your right to manage every aspect of the strategy of the case. Indeed, it is your attorney's professional responsibility to do that and your attorney is free to ignore your

> suggestions as to trial strategy. Your attorney can't compel you with respect to a plea but much of the rest of how the trial is conducted is up to your attorney's discretion and that may include the discretion to decide which witnesses that you believe may have relevant information. The attorney simply does not need to contact. Because if you look at the information, and that's what I was doing. The information here speaks about a fairly straightforward set of factual events, and so if there are eye witnesses certainly counsel has the responsibility to talk to them. But if you're talking about character witnesses or collateral witnesses or witnesses to try to impeach other than the testimony of other witnesses to events that happened, an attorney is not required to make those sorts of inquiry. And can legitimately and without violating the Canons of Ethics insist to a client that that's not going to happen.

6/11/02, pp. 27 – 30.

The Court also warned the defendant about the delay that would result from the granting of his motion: "As you said yourself, Mr. Brillon, this is somewhat of a dubious victory in your case because it simply prolongs the time that you will remain in jail until we can bring this matter to trial." 6/11/02, p. 27. Attorney Paul Donaldson was appointed the same day to represent the defendant.

At a status conference on August 5, Attorney Donaldson indicated that the defendant felt that it would be important to speak to at least six or eight people in connection with impeachment of the alleged victim, and that it would be necessary to have at least sixty additional days in order to obtain an investigator and speak to these people. 8/5/02, p.6. The defense was ordered to disclose any additional witnesses by September 16, 2002, and the case was to be placed on the October jury list, with priority. P.C., p.4

d. Third Dismissal of Attorney, August 28 – November 26, 2002.

On August 28, 2002, the defendant again sought to dismiss his attorney, writing to the trial court and stating that he lacked confidence in Attorney Donaldson's abilities. P.C., p. 66. He filed a motion to the same effect on October 22, 2002, and the matter was heard on November 26, 2002. Attorney Donaldson did not oppose the motion, and indicated that the Defender General's Office had intended to reassign the case in any event. The court granted the motion to dismiss. 11/26/02, p.10.

e. Attorney David Sleigh, November 27, 2002 – April 10, 2003.

On November 27, 2002, the Defender General assigned Attorney David Sleigh to represent the defendant. However, due to apparent mis-communications among the Defender General's Office, the court, and Attorney Sleigh, he did not actually begin representation until January 15, 2003. At a

status conference on February 19, 2003, a deposition deadline of April 30, 2003 was set, and trial was to be held in late May, 2003. P.C., p.4. However, on April 10, 2003, Attorney Sleigh filed a notice of withdrawal, and informed the defendant that the Defender General's Office would be securing new counsel for him because of a modification of Attorney Sleigh's contract with that Office. P.C., pp. 77 – 78.

f. Interregnum, April 11 – July 31, 2003.

The Public Defender's Office did not assign a replacement for Attorney Sleigh until June 20, 2003, at which time it notified the trial court that Attorney Kathleen Moore would be hired and would accept assignment of the case as of August 1, 2003. P.C., p. 92. In the meantime, on May 7, 2003, the defendant filed a pro se motion to dismiss in the interests of justice, citing the delay in bringing him to trial.

g. Attorney Kathleen Moore Preparation, August 1, 2003 – February 19, 2004.

A status conference was held on August 11, 2003, at which time the defendant indicated that he was ready for trial other than four or five witnesses who had not been interviewed. He wondered whether, in light of the passage of time, if it would be possible to skip formal depositions and just to take their statements. The court informed him that that was up to him and his attorney, and "If in 30 days you and Ms. Moore walk in and say, we're ready to go to trial, I

don't need to know why." 8/11/03, p.6.

Another status conference was held on September 8, 2003. The Defendant's Brief incorrectly states that at this status conference "the case was set to start from scratch." Appellant's Brief, p. 37. The court suggested that Attorney Moore review previously filed motions, then notify the court within two months, by November 7, which motions it wished the court to consider. Responses would then be due within two weeks after that, November 21. 9/8/03, p. 15. This was not "starting from scratch," but rather giving the defense attorney an opportunity to control her own case.

On November 5, 2003, the defense and the State stipulated to an extension of the November 7 deadline to December 8, and an extension of the response date to December 22. Attorney Moore indicated that she was still gathering materials from prior counsel and awaiting a transcript of a mistrial in a related matter. P.C., p. 93. This motion was granted. P.C., p. 6. At a status conference on December 8, 2003, this deadline was further extended 60 days "as counsel's files were incomplete and additional documents were needed from the State's Attorney and predecessor counsel." P.C., p. 95. A further, final, agreed upon extension was sought and granted to February 20, 2004. P.C., p. 95.

h. The Defendant's Motion to Dismiss, February 20 – April 19, 2004.

On February 20, 2004 (docketed February 23, 2004), Attorney Moore filed a motion to dismiss all pending charges against the Defendant for violation of his speedy trial rights. P.C., p. 96. This motion was denied on April 19, 2004.

i. Pre-Trial Period.

A status conference was held on April 26, 2004 during which a number of remaining issues were discussed, such as obtaining a witness list from the State, and locating a missing deposition tape. The defense requested a July trial date. After some discussion of scheduling issues, the court set, with the defense agreement, a trial date of June 14, 2004. 4/26/04, p. 14. The trial was subsequently begun on that date. P.C., p. 8.

2. Analysis of Responsibility for Delays.

a. Recusal Motion and Motion to Dismiss.

The defendant filed a baseless motion to recuse on October 3, 2001 based upon information in his possession since at least August 10, 2001, which was denied on November 20, 2001. The defendant also filed a motion to dismiss on various grounds on February 20, 2004, which was denied on April 19, 2004. Delays attributable to a defendant's motions and reasonable court scheduling do not count against the State. State v. Keith, 160 Vt. 257, 268 (1993). The defendant should not be permitted to write a letter to the judge, wait two months to file a motion to recuse

based upon that letter, then claim the two months as delay for purposes of a speedy trial violation. Accordingly, none of the delay from August 10, 2001 through November 20, 2001, or from February 20, 2004, through April 19, 2004, should be considered when determining whether a speedy trial violation occurred.

b. Changes in Counsel.

Delays caused by change in counsel, even if not personally caused by the defendant, are omitted from the speedy trial calculation:

> In this case, the defendant did not personally cause the changes in counsel required by the conflicts faced by assigned counsel. Nonetheless, assigned counsel stands in the shoes of counsel hired by a defendant, see In re Shuttle, 125 Vt. 257, 258, 214 A.2d 48, 49 (1965), and delay arising out of the relationship between attorney and client must be attributed to the defendant, and omitted from consideration.

State v. Trombley, 148 Vt. 293, 299 – 300 (1987). This is particularly true where the delay results from the defendant's own instigation:

> Based on the apparent breakdown in communications between attorney and client, the court granted the request on January 11, 1984. This delay was

> instigated by the defendant himself, and thus comes directly under the holding in Cameron, and is excluded from computation of his speedy trial claim.

Trombley, id.

While a change in counsel does not, of course, permit an indefinite delay, each counsel must be given a reasonable time to familiarize him or herself with the trial, and reasonableness must be viewed in light of the fact that the defendant's is not the attorney's only case. See, State v. Crannell, 170 Vt. 387, 408 (2000) (speedy trial claim denied despite 34 months of pretrial incarceration in part because "Defendant twice substituted counsel, and each new attorney required several weeks or months to become familiar with the complex record.") In this case, the defendant dismissed his first attorney four days before trial (February 22, 2002), and then dismissed his second attorney only three months later (May 20, 2002). A third lawyer was appointed almost immediately, but within three months (August 28, 2002) the defendant was again seeking to dismiss this lawyer. After filing a formal motion on October 22, 2002, and after a hearing, the dismissal was granted on November 26, 2002.

The defendant's dissatisfaction with his attorneys appear to have been based primarily upon their unwillingness to conduct trial strategy and tactics the way the defendant wished them to, by using the trial as a forum for airing his grievances against Michelle (or, as one attorney put it, to "haul in people and relatives just to trash" her. 6/11/02, p. 18). The defendant was specifically warned by the trial court

that he did not have the right both to representation by counsel and to control of such tactics, 6/11/02, pp. 27 – 30.

For these reasons, the delay occasioned by the defendant's insistence upon dismissing counsel should not be included in the calculation. This period runs from February 22, 2002 through November 26, 2002.

A further delay ensued from November 27, 2002 through July 31, 2003, during which time the Office of the Defender General assigned an attorney who later withdrew for contractual reasons, and then was unable to replace him for funding reasons until the first day of August. While this period of time cannot be attributed to the defendant, the United States Supreme Court has held that such "neutral" reasons for delay should count less heavily than situations in which the State has deliberately sought delay. "'A more neutral reason such as negligence or overcrowded courts should be weighted less heavily....' This factor, then, should be considered to weigh against the state, but not very strongly." State v. Unwin, 139 Vt. 186, 196 (1980), quoting Barker v. Wingo, 407 U.S. 514, 531 (1972).

From August 1, 2003, through trial, the defendant was represented by assigned counsel, Kathleen Moore, and the record does not indicate that the defendant was dissatisfied with her progress in the case. Ms. Moore was also assigned on the same day to represent the defendant in a number of other pending cases: Docket 928-7-00 Bncr, felony violation of an abuse prevention order with an habitual offender enhancement; Docket 929-7-00 Bncr, misdemeanor

unlawful mischief; Docket 509-5-01 Bncr, obstruction of justice with an habitual offender enhancement; Docket 959-7-01 Bncr, driving while license suspended, fourth offense; and, on March 12, 2004, Docket 382-4-03 Bncr, felony violation of abuse prevention order with an habitual offender enhancement. P.C., pp. 96 et seq. Ms. Moore proceeded to familiarize herself with all of these cases, obtaining materials from prior attorneys and reviewing all previous filings. With the concurrence of opposing counsel, she obtained extensions to a deadline for motions and discovery, and finally filed an omnibus motion to dismiss in all of the above-listed cases (except for the 2003 case) on February 20, 2004. Id. Upon denial of that motion on April 26, 2004, trial was set for, and held, less than two months later. Such reasonable court scheduling does not count against the defendant's speedy trial rights. State v. Keith, 160 Vt. 257, 268 (1993).

3. Conclusion: Actual Period Of Delay.

By the above analysis, the delay not attributable to the defendant, or to reasonable attorney preparation or court scheduling, extends from November 27, 2001 through July 31, 2001, a period of eight months. However, because these delays were unintentional, they should be weighed "less heavily" for Sixth Amendment purposes. The remaining periods of time were due to the defendant's practice of dismissing his attorneys either immediately before trial or before they had an opportunity to fully review the case file, or due to motions filed by the defense or continuances sought by the defense.

DISTRICT COURT OF VERMONT
UNIT II, BENNINGTON CIRCUIT
Bennington District Court
200 Veterans Memorial Drive, Suite 13
Bennington, VT 05201
(802) 447-2727

ENTRY REGARDING MOTION

State v. Michael J. Brillon, Docket No: 957-7-01 Bncr

Title of Motion: Motion for Special Assignment of Judge Carroll
Date Motion Filed: April 4, 2002
Motion Filed By: Brian K. Marthage (Esq.) (counsel for State)
Date Response Filed: None filed

____ Granted Compliance by: _____
XX Denied
____ Scheduled for hearing on: _____, at _____ Time Allotted _____
____ Other

The court finds that there is nothing complex about this action warranting special assignment.

____[signed]_____ Date: __4/16/02_____
Presiding Judge

Date copies sent to: _____ Clerk's Initials _____
cc: Brian K. Marthage, Esq. (State)
Gerard J. Altieri, Esq. (Defendant)

01:15 PM 957-7-01 Bncr Motion Hearing to consider:
Dismiss Assigned Counsel

State vs. Brillon, Michael J.

SCHEDULING/ENTRY ORDER

Scheduled for:	Commenced	Completed	Continued
1. Motion to Appoint Substitute Counsel	X	X	

Judge's Entries:

Defendant and counsel present. Following colloquy, Court determines that attorney-client relationship has deteriorated so significantly that motion must be granted.

Court warns Defendant that he is not entitled to either counsel of choice, nor counsel who will discharge his every tactical request. Disagreement over tactics will not be considered sufficient, without more, to warrant discharge, if such motion is made in the future, unless Defendant is prepared to represent himself pro se.

ORDER: Appoint substitute counsel. Set for status conference as soon as possible after appointment is made.

PAUL DONALDSON, ESQ. ASSIGNED

Next Proceeding:
Scheduled for:
Judge: John P. Wesley

STATE OF VERMONT
District Court of Vermont
Unit No. 2, Bennington Circuit
200 Veterans Memorial Drive Suite 13
Bennington, VT 05201
www.VermontJudiciary.org - (802) 447-2727

ENTRY ORDER

January 8, 2003

State v. Brillon, Michael J. Docket No. 957-7-01 Bncr

Within 2 weeks the Defender General will provide the Court with the name of the attorney that will be representing Mr. Brillon. The Court will set status conference after that.

Ordered by:
District Court Judge Karen R. Carroll

_____[signed]_____

STATE OF VERMONT
District Court of Vermont
Unit No. 2, Bennington Circuit
200 Veterans Memorial Drive Suite 13
Bennington, VT 05201
www.VermontJudiciary.org · (802) 447-2727

NOTICE TO ASSIGNED COUNSEL

David C. Sleigh, Esq.
65 Railroad Street
St Johnsbury VT 05819

Tel: 748-5176

January 22, 2003

Re: State vs. Brillon, Michael J.

957-7-01 Bncr Ct. 1	2ND DEGREE DOMESTIC ASSAULT/HAB OFF	fel
957-7-01 Bncr Ct. 2	CONTEMPT OF COURT	mis
957-7-01 Bncr Ct. 3	CONTEMPT OF COURT	mis
959-7-01 Bncr Ct. 4	DLS #4 OR ABOVE	mis

Pursuant to 13 V.S.A., Section 5272 and Supreme Court Administrative Order No. 4, you have been assigned to represent the defendant in the above-entitled action because:

[ ] 1. of a conflict of interest with State v. _____, Docket No. _____.

[ ] 2. of a conflict in interest in re _____, Docket No. _____.

[X] 3. Co-counsel or Associate Counsel Assigned -
Reason: Serious felony assignment.

You are advised to review Administrative Order No. 4, and in particular, Section 6 of that Order, for information concerning reimbursement of expenses and payment of compensation. Additional information can be obtained directly from the Assigned Counsel Coordinator.

____[signed_____
District Court Clerk

Distribution: Assigned Counsel, State's Attorney, Defendant, Defender General if ad hoc assignment, Case File

STATE OF VERMONT

Form No. 418
Continuance Request

STIPULATION/MOTION FOR CONTINUANCE

__ DISTRICT COURT OF VERMONT
__ SUPERIOR COURT OF VERMONT

UNIT NO. __, _____CIRCUIT, COUNTY

State

v.

Michael Brillon

DOCKET NO. _____

1. The undersigned counsel and parties request that the Evidentiary - Hold Without Bail now set for 8/15/01 at 1:00 p.m. be continued, at least until 8/20/01.

2. (Criminal Cases) This case was arraigned on or about 8/6/01.

3. This motion is being filed by: (If stipulation, please indicate initiating party.)
X Plaintiff/State
By stipulation.
X Defendant/
Juvenile.
_ Other

4. The reason for this requested delay is as follows: (Be Specific) Attorney Ammons is previously committed to moving his former private office in Brattleboro; and has scheduled a vehicle and labor. Defendant, although jailed has given counsel his consent herefor.

Signature of State/Plaintiff's Attorney	Date
[signed]	8/14/01

Signature of Defendant Attorney	Date
[signed]	8/14/01

Signature of Plaintiff (civil case)	Date

Signature of Defendant/Juvenile	Date

Signature of Probation Officer/SRS Worker	Date

If juvenile case, or defendant is under 18:

Signature of Parent or Guardian	Date

NOTE: FILE ALL COPIES WITH THE COURT. YOU WILL RECEIVE A COPY WITH THE COURT'S DECISION.

ACTION BY COURT/NOTICE OF HEARING

X Granted _ Denied Comments:

Signature of Judge	Date
[signed]	8/14/01

ALL PARTIES MUST BE PRESENT

Date copies sent to parties _____
Clerk's Initials _____

cc: ____ Plaintiff's Attorney
____ State's Attorney
____ Public Defender
____ Defendant's Attorney
____ Probation and Parole Office
____ Department of SRS
____ Guardian Ad Litem
____ Other:

DISTRICT OF VERMONT
UNIT TWO, BENNINGTON CIRCUIT

State of Vermont	]	Docket No. 957-7-01 Bncr
	]	
v.	]	
	]	
Michael Brillon	]	

State's Request for Final Felony Pre-trial and Placement on the February Trial List

Now comes the State of Vermont, by and through its Deputy State's Attorney for Bennington County, Brian K. Marthage and hereby moves this court to set a final felony pre-trial conference in this matter and place the case on the February trial list.

Defendant has been held without bail under 13 V.S.A. § 7553 since July 30, 2001. Defendant remains incarcerated at this time, and no evidentiary hearing has been scheduled despite requests of the State.

Defendant has a conflict with Judge Howard, and this case must be heard before Judge Carroll, creating additional scheduling problems.

At this point, depositions and documentary discovery are complete. Since Defendant has been on a hold without bail status for this charge for an extended period of time, in the interests of justice, this matter should be set for a trial in February, 2002 or earlier.

Dated this Thursday, December 27, 2001, at Bennington, Vermont

_____

Brian K. Marthage
Deputy State's Attorney

Cc: Richard Ammons, Esq.

STATE OF VERMONT
BENNINGTON COUNTY, SS.

STATE OF VERMONT	)	DISTRICT COURT OF
	)	VERMONT
V.	)	UNIT I,
	)	BENNINGTON
MICHAEL BRILLON	)	CIRCUIT

DOCKET No. 957-7-01 Bncr

MOTION TO CONTINUE DISCOVERY and TENTATIVE FEBRUARY JURY DRAW

NOW COMES defendant, Michael Brillon, by and through counsel, Richard F. Ammons, Jr., and hereby respectfully submits his MOTION TO CONTINUE DISCOVERY in the above-captioned matter, as follows:

(1) that, on 7/30/01, defendant was arraigned (count 1 DAD2/H.O., count 2, VCR, count 3, VCR and in docket 959-7-01 count 1, DLS4);

(2) that the parties' counsel have conducted much discovery since the arraignment, including depositions of all previously listed State witnesses - however, the deposition of the material witness, Michelle Tatro, has not been concluded; further, the State has disclosed additional witnesses on 1/9/02, for whom a deposition of, at least, one of them must

be conducted;

(3) that defendant's investigation and development of his own case in chief is still underway from which defense counsel anticipates disclosing, at least, one new witness [one witness has been alluded to in conversation between the parties' counsel, but cannot be formally listed until said witness returns from medical leave and can meet with defense counsel];

(4) that defendant acknowledges through counsel that any delays in his proceedings attributed to the defendant or his counsel will not count as time calculated, for speedy trial purposes, or other potential claims of undue delay, if any.

Wherefore, Defendant respectfully requests the Court issue its Order Granting the foregoing Motion.

Dated at Bennington, County of Bennington and State of Vermont on this 17th day of January 2002.

Respectfully submitted,

_____

Richard F. Ammons, Jr.
Public Defender

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been furnished to the State Attorney's Office (DSA Brian Marthage) by U.S. Mail\hand this 17th day of January 2002.

_____

Richard F. Ammons, Jr.
Public Defender

DISTRICT OF VERMONT
UNIT TWO, BENNINGTON CIRCUIT

State of Vermont	]	Docket No. 957-7-01 Bncr
	]	
v.	]	
	]	
Michael Brillon	]	

State's Response to Defendant's Motion to Continue

Now comes the State of Vermont, by and through its Deputy State's Attorney for Bennington County, Brian K. Marthage, Esq. and hereby opposes Defendant's Motion to Continue Discovery and Jury Draw.

The basis of the State's opposition is three-fold. First, defense counsel claims to need a continuance to finish the deposition of Michelle Tatro. Defense counsel took the deposition of Michelle Tatro on October 4, 2001. He has had more than 3 months to clear up any outstanding issues, but has not made any efforts to do so. The matters that need to be addressed are minimal and should take no more than one hour. This is no reason for a delay.

Secondly, defense counsel claims that it is necessary to depose witnesses disclosed by the State on January 9, 2002. The only new witnesses disclosed by the state are three arresting officers on Defendant's prior felony convictions. They have no facts relevant to this charge. If the habitual offenders issue is put to the jury, these three officers will simply identify the

defendant as the individual they arrested for their respective charges.

Third, Defendant claims he is still developing his case. At heart, this is a simple domestic assault trial. It has two enhancements that make the penalty significant, but the core of the charge is a simple domestic assault. It is difficult to comprehend how defense counsel could still be working to develop it's "case in chief" so long after the incident in question. The court should hold defense counsel as well as the State to the burden of timely investigation and disclosure.

The State posits two other reasons for denying a continuance. First, Defendant has actively sought to have Judge Carroll removed from this case. Defendant's recusal motion was denied by Judge Carroll and Judge McCaffrey. Knowing that Judge Carroll rotates to Brattleboro in March, the State believes Defendant's other motivation for seeking a continuance is to accomplish his original goal: removing Judge Carroll from this case.

Finally, this Defendant has three habitual offender cases pending before the Bennington District Court. This case has trial priority, as it in the only case on which the defendant is being held without bail. Given that Defendant will need to be tried in front of three different jury panels, continuing this jury draw means delaying the resolution of all Defendant's cases, not just this one.

The State respectfully requests this court deny

Defendant's Motion and schedule this matter for trial in February.

Date this Tuesday, January 22, 2002, at Bennington, Vermont.

_____

Authorized User
Deputy State's Attorney

cc: Rick Ammons, Esq.

STATE OF VERMONT
BENNINGTON COUNTY, SS.

STATE OF VERMONT	)	DISTRICT OF VERMONT
	)	UNIT 1, BENNINGTON
V.	)	CIRCUIT
	)	DOCKET NO. 957-7-01
MICHAEL BRILLON	)	BNCR

SECOND MOTION TO CONTINUE JURY DRAW AND TRIAL

NOW COMES defendant, Michael Brillon, by and through counsel, Richard F. Ammons, Jr., and hereby respectfully submits his SECOND MOTION TO CONTINUE JURY DRAW AND TRIAL in the above-captioned matter, as follows:

(1) that, on 7/30/01, Mr. Brillon was arraigned in said matter for, among other things, 2nd Degree ADA, as a habitual offender;

(2) that Attorney Ammons was assigned to represent Mr. Brillon on that date;

(3) that attorney Ammons had been appointed as Public Defender, on 7/1/01, to serve as one of only two full-time Public Defenders in Bennington County;

(4) that, due to what had become a large backlog of unfinished and untouched

cases in the office prior to Attorney Ammons' appointment, he had an inordinately large caseload upon his arrival;

(5) that, as of 1/22/02, approximately seven moths later, according to Public defender office statistics, Attorney Ammons' caseload has been trimmed to his present handling of 174 clients with 331 charges, 55 of which are felonies;

(6) that notwithstanding Attorney Ammons' ongoing struggle with the important balance between the efficient use of professional time and resources versus his duty to provide a thorough and competent defense for each of his clients, he has made a good-faith effort to comply with the Court's, and the State's, demands in the instant case, as he has in all of his cases;

(7) that, notwithstanding Attorney Ammons' said effort, he finds himself (with his client) at the eve of trial still scrambling to acquire significant portions of discovery in the instant case, while (for the ten days in advance of 2/26/02 - the draw) being the only full-time attorney in the Bennington Public Defender's Office (due to the vagaries of co-counsel's own schedule commitments), and, certainly, continuing to attempt to satisfy demands

and requirements in all of Attorney Ammons' other cases;

(8) that, on 12/28/01, the State moved the Court for placement of this case on the February trial list;

(9) that, on 1/17/02, Attorney Ammons filed Defendant's Motion to Continue Discovery and Tentative February Draw (see attached);

(10) that, on 1/22/02, the State opposed Defendant's Motion;

(11) that, on 1/23/02, the Court Denied Defendant's Motion and set the matter for a 2/26/02 draw and go, addressing in its order only Defendant's concern for continuing depositions up to the eve of trial (one such deposition being conducted at the end of this day);

(12) that, however, there remain significant matters that must be addressed by Defendant and Attorney Ammons before counsel will be prepared to go forward at trial;

(13) that, the follow-up deposition of the complaining witness, Michelle Tatro, and the testimony that ensued therefrom resulted in (what Attorney Ammons anticipated at the time of his 1/23/02

Motion to Continue) several witnesses coming forward who may be critical to Mr. Brillon's defense;

(14) that, compounding the mere logistical dilemma of the last-minute acquisition and assimilation of discovery in this case, is that there have also arisen a number of legal and ethical issues before Attorney Ammons in his efforts to meet the Court's demand that he go forward on 2/26/02, some of which come to bear on his ability to even continue representing Mr. Brillon, at all;

(15) that, Attorney Ammons cannot, without prejudicing his client's case, enumerate them with specificity in the body of this motion;

(16) that, Attorney Ammons, however, as an officer of this court in good standing, respectfully requests that the Honorable Court extend to him, more than just the courtesy, but the benefit of his good standing by allowing him the discretion that is a major portion of his duty to ascertain for himself and his client whether he is, or is not, under the circumstances, competent to effectively represent his client within the present schedule and those circumstances;

(17) that, accordingly, Defendant and his counsel request that the court set this

matter over to the April draw, assuming that Attorney Ammons is able (after he concludes his investigation of new witness information - as well as his review of pending discovery requests still outstanding) to continue his representation of Mr. Brillon, at all;

(18) that, notwithstanding various pro se filings by Defendant (most recently with the assistance of other unlicensed counsel), Attorney Ammons has clearly ascertained that Mr. Brillon is in agreement with this Motion to Continue;

(19) that defendant acknowledges through counsel that any delays in his proceedings attributed to the defendant or his counsel will not count as time calculated, for speedy trial purposes, or other potential claims of undue delay, if any.

Wherefore, Defendant respectfully requests the Court issue its Order Granting the foregoing Motion.

Dated at Bennington, County of Bennington and State of Vermont on this 22nd day of February, 2002.

Respectfully Submitted,

_____

Richard F. Ammons, Jr.
Public Defender

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been furnished to the State Attorney's Office (DSA Brian Marthage) by U.S. Mail\hand this 22nd day of February, 2002.

_____

Richard F. Ammons, Jr.
Public Defender

STATE OF VERMONT
BENNINGTON COUNTY, SS.

STATE OF VERMONT	)	DISTRICT OF VERMONT
	)	UNIT 1, BENNINGTON
V.	)	CIRCUIT
	)	DOCKET NO. 957-7-01
MICHAEL BRILLON	)	BNCR

MOTION TO WITHDRAW AS COUNSEL

NOW COMES attorney Richard F. Ammons, Jr., assigned by the Honorable Court, on or about 7/28/01, as legal counsel for the Defendant in the above-captioned matter, and hereby respectfully submits his MOTION TO WITHDRAW AS COUNSEL, pursuant to V.R.Cr.P. 42 (c) and the Rules of Professional conduct, as follows:

(1) that Attorney Ammons' employment as Mr. Brillon's assigned counsel has been terminated by Mr. Brillon, as stated by Mr. Brillon, on Friday, 2/22/02, at the close of a hearing on his Second Motion to Continue Jury Draw and Trial;

(2) that Mr. Brillon, in a lengthy and detailed conversation with Attorney Ammons by telephone on 2/24/02, advised Attorney Ammons that among the reasons for attorney Ammons' termination include (i) counsel's failure to adequately maintain communication

with Mr. Brillon in the period of time from Mr. Brillon's initially being held without bail pending the instant matter, through the present, (ii) counsel's failure to adequately prepare Mr. Brillon's case for trial, now due to begin on 2/26/02, and (iii) certain irreconcilable differences in preferred approach between Mr. Brillon and counsel as to trial strategy, as well as other legitimate legal decisions;

(3) that, accordingly, the Rules of Professional Conduct state that Attorney Ammons "shall withdraw from the representation of" Mr. Brillon, pursuant to rule 1.16(a)(3);

(4) that, further, Attorney Ammons must move to withdraw as Mr. Brillon's counsel because Attorney Ammons has recently learned of several witnesses who are critical to Mr. Brillon's defense in the instant matter, that, on the night of July 27, 2001, Michelle Tatro was high on drugs, assaultive toward Mr. Brillon, and would not desist, and that Mr. Brillon acted only in self-defense;

(5) that, four of the said witnesses (who must remain nameless for purposes of this motion, as explained below), could confirm through testimony, Ms. Tatro's drug use and erratic behavior in the days prior to and through the day of the

incident;

(6) that, said testimony is relevant to the instant matter as it goes to, not only the truthfulness of Ms. Tatro's expected testimony, but also to her capacity to adequately recall and accurately recount the events incident to said matter;

(7) that, while said information is likely exculpatory to Mr. Brillon, said information is likely to inculpatory to said witnesses;

(8) that, said witnesses are either past or present clients of the Bennington Public Defender's Office, thus, creating a clear conflict of interest for Attorney Ammons, pursuant to Rule 1.7 of the Rules of Professional conduct;

(9) that, on 2/24/02, Attorney Ammons consulted with the Vermont Defender General, Matthew F. Valerio, who advised Attorney Ammons to move to withdraw from said matter, as set forth herein, and to further propose to the court that it reassign Mr. Brillon's case to Matt Harnett, who is under contract with the Defender General to handle certain matters, including life penalty cases, such as this one, where the primary Public Defender has been discharged or has a conflict of interest, as described

herein;

(10) that, Attorney Ammons has fully discussed with Mr. Brillon the potential implications and consequences of both Mr. Brillon's decision to terminate Attorney Ammons' employment as counsel, as well as the further enumerated basis for counsel's motion to withdraw; and Mr. Brillon has made clear his understanding thereof, and has given his instruction thereto.

WHEREFORE, Attorney Ammons respectfully submits that he has good cause to withdraw from said employment, as contemplated under V.R.Cr.P. 44.2(c), and requests that the Honorable Court GRANT his Motion to Withdraw, pursuant to the rules of Professional conduct, as set forth herein.

Dated at Bennington, County of Bennington and State of Vermont on this 25th day of February, 2002.

Respectfully submitted,

_____

Richard F. Ammons, Jr.
Public Defender

CERTIFICATE OF SERVICE

Attorney Ammons hereby certifies, by his signature below, that he has served, mailed by first class/postage paid, hand delivered, or otherwise

properly provided a full and true copy of the above Motion to Withdraw as counsel, on the date below, to the following individuals:
Brian Marthage, Bennington County Dep. State's Attorney
Matthew F. Valerio, Vermont Defender General
Michael Brillon, Marble Valley Correctional Center

_____

Richard F. Ammons, Jr.
Public Defender

DISTRICT OF VERMONT
UNIT TWO, BENNINGTON CIRCUIT

State of Vermont	]	Docket No. 957-7-01 Bncr
	]	
v.	]	
	]	
Michael Brillon	]	

State's Motion for Special Assignment of Judge Carroll

Now comes the State of Vermont, by and through its Deputy State's Attorney for Bennington County, Brian K. Marthage and hereby moves the Administrative Judge pursuant to V.R.Cr.P. 50 and 57 for Judge Karen Carroll to be specially assigned to hear this matter at trial.

As a basis for this motion, the state represents the following:

1. Except for arraignment, Judge Carroll has been the presiding judge on all contested matters since this case was filed. She has presided over numerous pretrial conferences as well as an evidentiary hearing.

2. In Fall, 2002, Defendant composed a letter to Judge Carroll that questioned her ability and voiced his opinion that he would be better off if she were not the judge in this matter.

3. Defense counsel filed a Motion to Recuse in October, 2001 in an attempt to get Judge Carroll removed from this case. The basis for this motion was solely the letter Defendant wrote to Judge Carroll.

4. Both Judge Carroll and Judge McCaffrey reviewed Defendant's Motion to Recuse and denied it.

5. After denying the Motion to Recuse, this matter was set for trial in February.

6. Judge Carroll was set to rotate to Brattleboro court in the beginning of March, and all parties, including the defendant knew this fact.

7. On January 23, 2002, Defendant filed a Motion to Continue. Judge Carroll denied this Motion, indicating that counsel had four more weeks to prepare for this matter, and that time should be sufficient.

8. This matter was set for a pick and go trial on February 26, 2002.

9. On February 22, 2002, Defendant again filed a Motion to Continue. The basis of Defendant's second motion to continue was the same as the first motion to continue. Judge Carroll also denied this motion.

10. On February 25, 2002, the very eve of trial, defense counsel moved to withdraw and Defendant asked for new counsel. The basis of requests was that Defendant had fired his attorney appointed for him by the court.

11. The State opposed these motions, arguing, inter alia, that this was yet another attempt by Defendant to avoid having Judge Carroll hear this case, and that "judge shopping" by the defendant was entirely improper.

12. The Court granted defense counsel's motion to withdraw on the basis that defense counsel could not zealously represent his client (no further explanation was proffered by defense counsel as to why this was).

13. In ruling on the Motion to Withdraw and the associated continuance, Judge Carroll acknowledge that the state had raised legitimate concerns about whether defendant by seeking a continuance at this late date, was engaging in judge shopping. She ruled that any prejudice resulting from the defendant's actions would be limited because she would be willing, if requested, to continue as trial judge on this case.

14. The State believes that, if not addressed

in this case, defendants will be encouraged to manipulate the judicial process in order for them to obtain what they perceive as a judge favorable to their case.

15. The courts cannot countenance the use of last minute delays and other tactics that frustrate timely justice and serve only to allow Defendant to achieve indirectly what he could not achieve directly, namely having Judge Carroll not hear this case.

16. Judge Howard, the current judge sitting in Bennington District Court, has a conflict, and he cannot hear this case.

17. Pursuant to V.R.Cr.P. 50, the Administrative Judge shall establish how criminal court cases are scheduled.

18. There is no criminal rule directed toward complex matters. However, V.R.Cr.P. 57 provides that where no procedure is otherwise specified, the court can proceed in any lawful manner.

WHEREFORE, for both practical reasons and policy reasons, State requests that Judge Carroll be specially assigned to hear the trial in this matter.

Dated this Thursday, April 04, 2002, at Bennington, Vermont.

_____

Brian K. Marthage
Deputy State's Attorney

Cc: Gerard Altieri, Esq.

STATE OF VERMONT
BENNINGTON COUNTY, SS.

BENNINGTON DISTRICT COURT

Michael Brillon
Defendant

V.
STATE OF VERMONT
Plaintiff

Docket No. #957-7-01 Bncr

MOTION TO DISMISS ASSIGNED COUNSEL
(Gerard Altieri)

NOW COMES, defendant, Michael Brillon, pro se and submits this Motion to Dismiss Attorney/lawyer Gerard Altieri, with the following facts to support claim in requesting the Honorable Court to seek other representation.

1) Has not filed motions that defendant is entitled to.

2) Virtually no communication whatsoever from attorney.

3) Will not provide defendant discovery material that the attorney has in his possession so defendant can make informed decisions.

4) Refuses to create an attorney-client relationship and working dialogue.

5) Attorney has claimed that he cannot be diligent because of heavy case load.

WHEREFORE, the defendant requests this Honorable Court to replace the Attorney, Gerard Alteieri, with someone else or to seek outside representation from another Legal Counsel.

DATED in Rutland, Vermont on this May 16, 2002

Respectfully Submitted

_____

Michael Brillon, Pro se

Bennington District Court

State of Vermont
Bennington County, SS

Docket No. 957-7-01 Bncr

Michael Brillon
Defendant

V.

State of Vermont
Plaintiff

Motion to Dismiss assigned counsel
Paul Donaldson

Now comes defendant Michael Brillon Pro se and submits this motion to dismiss Attorney Paul Donaldson with the following facts to support the claim in requesting this honorable court to seek other Representation.

{1. Has not filled motions that defendant is entitled to.

{2. there is virtually no communication whatsoever from Attorney

{3. Refuses to provide defendant with discovery material that the Attorney has in his possession.

{4. Refuses to create an Attorney client relationship and working dialogue.

{5. Because of this blatant constructive denial of

effective assistance of counsel my confidence in this particular Attorney is irreconcilable.

Wherefore this defendant respectfully request's that this honorable court replace this attorney with someone else and to seek outside representation from some other legal counsel. It is not this defendant's intention to delay or compromise the orderly running of this court. It is this defendant's intention to go to trial effectively.

Respectfully Submitted,

Michael Brillon

STATE OF VERMONT
BENNINGTON COUNTY, SS.

District Court of Vermont
Unit No. 3, Bennington Circuit
Docket No. 957-7-01 Bncr

STATE OF VERMONT

V. MOTION TO ENLARGE TIME

MICHAEL BRILLON

COMES NOW the Defendant, by and through counsel, and respectfully moves this Honorable Court to order the date by which the Defendant is to notify the State of trial witnesses from March 30, 2003 to April 11, 2003. Additionally, Defendant requests that the time in which to complete depositions, discovery and motions be extended from April 30, 2003 to May 15, 2003. Defense counsel has been in trial in Chicago, Illinois from February 3 to February 21, 2003. Additional time is necessary to adequately investigate the case.

DATED at St. Johnsbury in the County of Caledonia on February 25, 2003.

Respectfully submitted,

David C. Sleigh
Counsel for Defendant

cc: State's Attorney

STATE OF VERMONT
BENNINGTON COUNTY, SS.

District Court of Vermont
Unit No. 2, Bennington Circuit
Docket Nos. 928-7-00 Bncr
957-7-01 Bncr
509-5-01 Bncr

STATE OF VERMONT

V. NOTICE OF WITHDRAWAL

MICHAEL BRILLON

COMES NOW the undersigned, David C. Sleigh, and hereby notices his withdrawal as counsel for the above-captioned Defendant.

DATED at St. Johnsbury in the County of Caledonia on April 10, 2003.

Respectfully submitted,

David C. Sleigh

cc: State's Attorney
Michael Brillon

STATE OF VERMONT
Bennington County, ss.

State of Vermont	)	Bennington District Court
	)	
V	)	Docket No. 957-7-01 Bncr
	)	
Michael Brillon	)	

MOTION TO DISMISS FOR LACK OF A PRIMA FACIE CASE

NOW comes defendant, Michael Brillon, pro-se, and pursuant to V.R.Cr.P. 12(d), requests this Court to dismiss the charge of Aggravated Domestic Assault, habitual offender, asserting that the State cannot support the elements necessary to gain a conviction at trial. The defendant further requests this Court waive the time requirements defined in the statute V.R.Cr.P. 12(e)(1), taking into consideration the complications implied by having eight attorneys and four judges involved in this case to date.

MEMORANDUM OF LAW

1). V.R.Cr.P. 12(d)(1) Motion. "The defendant may move for dismissal of the indictment or information on the ground that the prosecution is unable to make a prime facie case against him. The motion shall specify the factual elements of the offense which the defendant contends cannot be proven at trial." (quotes mine)

2). (a) 13 VSA ss 1044(a) "A person commits the crime of second degree aggravated domestic assault if the person:

(1) commits the crime of domestic assault and causes bodily injury to another person and such conduct violates specific conditions of a criminal of a court order in effect at the time and offense imposed to protect that other person;

(2) commits a second or subsequent offense of domestic assault, which causes bodily injury." (quotes mine)

ARGUMENT CONT'D

3). 13 VSA ss 1042. Domestic assault

Any person who attempts to cause or wilfully or recklessly causes bodily injury to a family or household member, or wilfully causes a family or household member to fear imminent serious bodily injury shall be imprisoned not more than one year or fined not more than $5,000, or both.

ARGUMENT

The defendant contends that the following factual elements of the offense, second degree aggravated domestic assault, as defined in 13 VSA 1044(a), cannot be supported by the State to a conviction at trial;

a). The State will be unable to prove that the defendant caused bodily injury.

(b) The State will be unable to prove that the alleged offense was the second or subsequent offense.

The defendant further asserts that the State cannot meet the burden of proof to gain a conviction at trial on the offense of domestic assault as defined in the statue 13 VSA 1042, in that the State cannot support the following factual elements;

a). The State cannot prove that the defendant wilfully or recklessly caused bodily injury to a family or household member.

b). The State will be unable to prove that the defendant wilfully caused a family or household member to fear imminent serious bodily injury.

THEREFORE, the defendant contends that the State will be unable to support a conviction at trial of either the offense as charged, or the lesser included offense of domestic assault as defined by statute.

SUMMARY

The defendant, Michael Brillon, asserts that at no time during the incident that gave rise to his arrest did he cause bodily harm to Michelle Tatro. The evidence that he caused bodily harm is slight, and evidence provided through statements and testimony of witnesses is so contradictory in nature that the only clear and cogent narrative of that evening is the affidavit sworn to by the defendant himself.

At no point in his narrative does the defendant

refer to striking the victim or to attempting to physically restrain her, other than the moment when the two struggled over an aluminum baseball bat. At this time, the defendant admits that he grabbed the bat to prevent Ms. Tatro from swinging. The victim's sister does recall Ms. Tatro having the baseball bat as described by the defendant.

The three pertinent statements that reflect the events of that evening all agree on these basic elements. 1) There was a verbal exchange between the defendant and the victim, 2) There was an assault, and 3) That at one point a baseball bat was used. Statements concerning allegations of other events are so contradictory in nature that the truth is impossible to sort from the fiction. The depositions follow this pattern of contradiction. Neither Ms. Tatro's rendition of events or her sister's version create a picture of the evening in question that bears the ring of truth. In contrast, the defendant's version of events (See attachment) is concise and detailed, and the narrative flows smoothly through the events of the evening. In this narrative, the baseball bat comes into play once again, when Ms. Tatro strikes the defendant outside near the car, as he was trying to get his daughter out of the car seat. Testimony from C.O. Roger Phillips at the Marble Valley Regional Correctional facility confirms that upon arrival, when the defendant was stripped as a routine part of the admissions process after his arrest, he (Phillips) saw a number of red and blue bruise type abrasions on his back and side that would be consistent with the defendant's narrative.

In the aftermath of the alleged assault, as the

two sisters were in the trailer of the neighbor, Deputy Sheriff Diana Kitteredge made an interesting observation. In her deposition before S.A. Brian Marthage and Public Defender Richard Ammons, on page 11, lines 12 through 34, Ms. Kitteredge refers to the sisters trying to figure their stories out. Replying to Richard Ammon's question on line 22 of page 11, "So they were, they seemed to be kind of ironing out the facts?, Ms. Kitteredge replied "Yes."

If allowed a hearing on this matter, the defendant will be able to offer evidence of perjured testimony within the body of the depositions that will bring the entire testimony into question.

The defendant further maintains that upon offering his proofs of perjured testimony made during depositions, the State will be unable to proceed to a conviction at trial.

THEREFORE, the defendant requests this Honorable Court to;

a). Accept jurisdiction over this matter.

b). Allow the defendant to proceed pro-se in this matter.

c). Grant a hearing on defendant's Motion to Dismiss.

RESPECTFULLY submitted this 21th day of April, 2003.

_____

Michael Brillon - Petitioner

STATE OF VERMONT
Bennington County, ss.

State of Vermont	)	Bennington District Court
	)	
V	)	Docket No.
	)	
Michael Brillon	)	

MOTION TO DISMISS IN THE INTEREST OF JUSTICE

NOW comes Defendant, Michael Brillon, by and through counsel, and motions this Honorable Court to dismiss the charge, 2nd degree aggravated domestic assault, habitual offender, in the interest of justice, pursuant to V.R.Cr.P. 48(b)(1)(2).

MEMORANDUM OF LAW

V.R.Cr.P. 48

(b) By Court. The court may dismiss the indictment or information.

(1) If the prosecution does not bring the defendant to trial within such time as the Supreme Court may provide by Administrative Order, or

(2) If the court concludes that such dismissal will serve the ends of justice and the effective administration of the court's business.

Rule 48(b)(1) incorporates the Supreme Court's current administrative Order No. 17, which requires the prosecution to be ready for trial within 90 days after arraignment when defendant is in custody and within six months after arrest in other cases. Under the order, both periods may be extended for cause or when delay is the fault of the defendant. The order is bottomed on Sixth Amendment speedy trial policy considerations. Cf. State v. Dragon, 130 Vt. 570, 298 A.2d 856 (1972).

MEMORANDUM OF LAW cont'd

"Treating ineffective assistance of counsel claims before trial where possible furthers the interest of judicial economy, for if trial court has sufficient information before trial it can most effeciently inquire into any inadequacy in the assistance of counsel and attempt to remedy it." U.S.C.A. Const. Amend. 6. State v. Leonard Peart, 621 So.2d 780 (La. 1993). (Quotes mine).

"'Reasonably effective assistance of counsel' means that the lawyer not only possess adequate skill and knowledge, but also time and resources to apply his skill and knowledge to task of defending each of his individual clients." U.S.C.A. Const. Amend. 6. State v. Leondard Peart, 621 So.2d 780 (La. 1993). (Quotes mine).

"If the accused is indigent and is charged with an offense punishable by imprisonment, he is entitled to assistance of counsel appointed by the court. Such counsel must be reasonably effective." State v.

Stripling, 354 So.2d 1297 , 1305 (La. 1978). (Quotes mine). see Strickland v. Washingotn, 466 U.S. 668, 697-89, 104 S.Ct. 2052, 2064-65, 80 L.Ed.2d 674 (1984).

"Prompt trial should be accorded an accused to protect him against prolonged imprisonment prior to determination of his guilt or innocence, to protect him against prolonged anxiety and public embarrassment attendant upon an untried accusation of crime and to protect accused from hazards of excessive delay which might deprive him of witnesses in his behalf or dull their memories in recall of the event and circumstances relevant to the charge." U.S.C.A. Const. Amend 6; Const. c. 1, art. 10. (quotes mine)
State v. Mahoney, 124 Vt. 488, 207 A.2d 143 (1965).

"In reviewing habeas petitioner's claim of ineffective counsel, appellate court's determination that multiple deficiencies in defense counsel's performance resulted in cumulative prejudice to defense obviated need for court to analyze individual prejudicial effect of each deficiency." U.S.C.A. Const. Amend. 6, Harris v. Wood, U.S.C.A. 64 F.3d 1432 (1995). (Quotes mine)

"prejudice may result from the cumulative impact of multiple deficiences." Harris v. Wood, U.S.C.A. 64 F.3d 1432 (1995).

MEMORANDUM OF LAW cont'd

"Although the primary burden is on the courts and prosecutors to assure that cases are brought to

trial, failure of a defendant to assert his right to a speedy trial will make it difficult to prove that he was denied such a right." U.S.C.A. Const. Amend. 6; Const. C. 1, art. 10. State v. Dragon, 130 vt. 570, 298 A.2d 856 (1972). (Quotes mine)

"A court confronted with a motion for dismissal on the ground that the defendant has been deprived of a speedy trial must make it's decision on a balancing test in which the conduct of both the prosecution and defendant must be weighed; factors to be considered include length of delay, defendant's assertion of his right and prejudice to defendant." U.S.C.A. const. Amend. 6; Const. C. 1, art. 10. State v. Dragon, 130 Vt. 570, 298 A.2d 856 (1972). (Quotes mine)

DISCUSSION

The defendant, Michael Brillon, was arrested on July 27, 2001, by officers of the Bennington Sheriff's department, at the home he shared with his live in girlfriend, Michelle Tatro, and charged with domestic assault, a misdemeanor. Since the incident took place on a Friday, Brillon was held over the weekend for arraignment on Monday in Bennington District Court.

At the defendant's arraignment on Monday morning, the State amended the misdemeanor charge to a second degree aggravated domestic assault, using a violation of conditions set at a prior hearing to allow for the felony enhancement. At the same time, citing the defendant's prior felony convictions, a total of three dating back to 1978/1980, the State further amended

the charge to include a habitual offender enhancement under 13 VSA ss 11, which provides for imprisonment of up to and including life upon conviction of a fourth or subsequent felony. The defendant was then held without bail in accordance with the provisions of 13 VSA ss 7553.

The defendant was represented at arraignment by public defender Marie Wood Esq. of Bennington. A plea of not guilty was entered on behalf of the defendant and he was returned to jail. Fred Bragdon, Esq. of the public defender's office also participated in the early stages of the defendant's case but both he and Wood were soon replaced by a third public defender, Richard Ammons, also of Bennington.

DISCUSSION cont'd

Richard Ammons would be the first and only attorney to accomplish anything of substance in the defendant's behalf. Ammons deposed several of the witnesses listed in the State's discovery, and none of the exculpatory witnesses requested by the defendant. As the depositions progressed, it became evident that the public defender's office had represented or was still representing a number of the witnesses listed by the defendant as being possibly exculpatory, and citing a conflict of interest, was instructed to withdraw from the defendant's case by the Defender General, Matt Valerio.

To replace the office of the public defender, Gerald Altieri Esq. was assigned as conflict counsel to

the defendant's case. This ends the actual progress in the case, and sets the stage for the ensuing representation that the defendant was about to receive as he proceeds to be assigned no less than four attorneys after Altieri, none of whom has had written or verbal contact with the defendant. In succession, the defendant was assigned Paul Donaldson, who withdrew from the case after a number of months with no contact with his client, and was replaced by Matt Harnett, who also never spoke with or contacted the defendant. Harnett apparently withdrew without consulting with his client, and was replaced by attorney Debrah Loevy-Rheys who also refused contact with the defendant.

Ms. Loevy-Rheys apparently also withdrew, again without consulting in any fashion with her client, to be replaced by David Sleigh, Esq., thus making him the eighth attorney of record since his arraignment, and Sleigh has yet to make any effort to contact the defendant, who has been incarcerated since his arraignment with no bail.

In addition to the numerous attorneys who have represented the defendant over the twenty months, four judges have presided over his case; Judge Nancy Corsones, Judge Karen Carroll, Judge John Wesley, and Judge Suntag. During this period of twenty months, the defendant has had one bail hearing, at which his request for bail was denied and he was ordered continued held without bail. Numerous requests for a speedy trial have gone unanswered by both the Court and by defense counsel.

The defendant has asserted his right to a speedy trial many times over in the course of his twenty two months in jail awaiting trial. He has never waived that right at any time. He further insists on his innocence, and can present a list of exculpatory witnesses, and has presented this list to defense counsel to no avail.

Quoting State v. Mahoney it is stated that "Prompt trial should be accorded an accused to protect him against prolonged imprisonment prior to determination of his guilt or innocence" (paraphrased).

DISCUSSION cont'd

This begs the question how long is too long? What is considered to be "prolonged imprisonment" as referred to in Mahoney? In the State v. Dragon the Vermont Supreme Court asserts that seven and one half months between arraignment and trial does not violate Constitutional standards. If we triple that figure, does that now fall within the definition of "prolonged imprisonment"? The defendant asserts that it does, and that his constitutional right to a speedy trial as defined in the 6th Amendment of the U.S. Constitution have been violated, as well as his rights under Chapter one, article 10 of the Vermont Constitution.

The defendant asserted his right to a speedy trial many times, to no avail. He claims that this has prejudiced his defense because it has deprived him of witnesses on his behalf and/or "dulled their memories

in recall of the event and circumstances relevant to the charge". (Again quoting Mahoney). The defendant supports this contention with the simple assertion that in the course of twenty months, his own memory of the relevant events is dulled, and it is reasonable to presume that his ability to participate in his own defense would suffer accordingly. A reasonable trier of the facts would not be remiss were he to infer that this would apply to any witness after such a prolonged period.

The defendant further asserts that the sheer number of attorneys who have been involved in his defense, presents the likelihood of multiple deficiencies as described in Harris v. Wood. The mere act of the passing of materials from one hand to the next in the parade of attorneys through the tableau of the defense affords ample opportunity for error and omission. Any loss of the material relevant to the defense would necessarily prejudice the defendant. After twenty months and numerous requests to counsel, the defendant has yet to obtain full Discovery, so the likelihood of recovering lost documents that may be relevant to the defense is minimal.

In State v. Dragon, the burden of bringing the case to trial is allocated to the courts and prosecutors, once the defendant has asserted his right to a speedy trial. Having asserted his right several times, the defendant contends that the courts and the prosecution have failed to uphold their responsibility thus violating both Vermont and U.S. Constitutions. Further analysis of the speedy trial issue in State v. Dragon prompted the Court to quote both of these

Constitutions in describing the balancing test that must be utilized when determining speedy trial abuses; "the length of delay, the defendant's assertion of his right, and the prejudice to the defendant." The defendant charges that the prosecution of this case by the State fulfills each of the requirements necessary to trigger a motion for dismissal on speedy trial grounds alone, which at the least would require an inquiry by the Court.

DISCUSSION cont'd

The Supreme Court of Louisiana in 1993, addressing the ineffective counsel issue in Section E of the Orleans Parish Criminal District, was faced with a condition similar in many respects to that existing in the Office of the Public Defender in Vermont. The case was State v. Leonard Peart, and will be cited several times during this discussion.

An overview of the Peart case reveals the following; Leonard Peart was arrested and charged with armed burglary, aggravated rape, attempted armed robbery, and first degree murder. He is indigent. The trial court assigned Rick Tessier, one of two public defenders assigned to Section E, to defend Peart.

Tessier, in light of the serious nature of the charges against Peart and the generally heavy workload and poor resources available to the public defender's office, filed a "Motion for Relief to Provide Constitutionally Mandated Protection and Resources."

In response, the trial court held a series of hearings on the defense services provided to Peart and other defendants in Section E of the Criminal District Court.

At the hearings the court found the following facts. At the time of his appointment (to Peart), Tessier was handling 70 active felony cases. His clients were routinely incarcerated 30 to 70 days before he meets with them. In the period between January 1 and August 1, 1991, Tessier represented 418 defendants.

It is appropriate to stop at this point and draw parallels between the conditions under which public defenders work in Louisiana and those in Vermont, particularly in Bennington County. Inquiry by the Court in the wake of Tessier's motion revealed a caseload of 70 active felony cases. In Vermont it is common for public defenders to handle three to four times that number of active cases due to the inadequate staffing and poor funding allocated for this function by the Vermont legislature. The condition is further exacerbated by the tendency of law enforcement to bring even minor cases before the State for prosecution, and the State's Attorneys to zealously prosecute every case that is presented. The discretion to dismiss minor charges or negotiate satisfactory plea agreements at arraignment is rarely used, thus burdening the Courts and the public defenders.

In Tessier's case, his clients are routinely incarcerated for 30 to 70 days before he meets with them. In Vermont, and in Bennington County in particular after arraignment, it is common for

incarcerated detainees to spend from 90 to 180 days without ever seeing their attorney, and up to two years before one can expect to draw a jury for trial, whether the defendant asserts his right to a speedy trial or not.

DISCUSSION cont'd.

Justice J. Dennis, dissenting in the issuance of the Louisiana Supreme Court's decision in Peart, observed, "Yet the conditions that affect indigent services in Orleans Parish are obviously not limited to Section E. To deny this is as whimsical as saying a person in early term is 'only a little bit pregnant'. On the other hand, the majority, without articulating constitutional principles or legal assistance guidelines, sweepingly creates a presumption that indigent defense services in Section E are ineffective and invites the trial judge to halt trials until the presumption is overcome by the State." State v. Peart, 621 So.2d 780, 792, (La. 1993).

The issue of addressing ineffective assistance counsel claims in pre-trial motions rather than through post-conviction remedies is considered in the Swift & Co. v. United States, 276 U.S. 311, 48 S.Ct. 311 72 L.Ed. 587 (1928), where it is stated that "Prospective relief designed to avoid harm can protect constitutional rights, even if the violation would not affect the outcome of a trial." (Citing Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 584, 43 L.Ed.2d 54 (1975).

The defendant charges that two basic elements have so violated his constitutional rights that his

entire defense is prejudiced as a result. The first is his claim of ineffective counsel as guaranteed under the 6th Amendment of the U.S. Constitution and Chapter 1, Article 10 of the Vermont Constitution. The body of this discussion supports this claim. Earlier decisions by the Courts and discussed in the body of this text demonstrate a precedent for relief in pre-trial action.

The second violation concerns the defendant's many assertions to his right of speedy trial, and the continued denial of such by the Court and the prosecution. The discussion above reveals that it is the duty of the Court and the Prosecution to secure this right in the event of assertion by the defendant. This failure triggers a valid complaint that the defendant's speedy trial right has been violated.

In summation, the defendant charges that these violations have so harmed his defense that he cannot expect to receive a fair trial.

THEREFORE, the defendant respectfully requests this Honorable Court to:

a). Accept jurisdiction in this matter

b). Allow the defendant to proceed pro-se, in the absence of counsel.

c). Grant his motion to dismiss in the interest of justice.

Respectfully submitted this 5th day of May, 2003.

_____, Michael Brillon, defendant

_____, Counsel for the defendant

STATE OF VERMONT
BENNINGTON COUNTY, SS.

VERMONT DISTRICT COURT
UNIT II, BENNINGTON CIRCUIT
DOCKET NO. 929-7-07 Bncr et als

STATE OF VERMONT

V.

MICHAEL BRILLON

STIPULATED REQUEST TO EXTEND MOTION DEADLINE

NOW COMES the undersigned, and hereby moves the Honorable Court for an extension of time to reconsider all motions filed in all cases and to refile those which the parties wish to pursue from November 7, 2003 to December 8, 2003, and an extension of the response date to December 22, 2003.

By way of support for this request Counsel for Defendant states that she is still awaiting the transcript of the mistrial in one of the matters, and is awaiting additional deposition transcripts and case materials from prior counsel Gwen Harris and Gerry Altieri. In addition, prior counsel Richard Ammons has just returned to work from an extended leave, and has been unavailable to consult with Counsel for Defendant in these matters.

In addition, the status conference which had been set for November 17, 2003 has been rescheduled to December 8, 2003 due to the unavailability of the Court on that date. In as much as the Defense requires this material and information to adequately prepare the case and the necessary motions, and has been diligent in pursuit of same, the undersigned assert that this additional time is a necessary minor delay which will potentially advance the resolution of these matters.

I am authorized to state that the State's Attorney's Office, per Brian Marthage, Deputy, has no objection to this request.

Dated this 3rd day of November, 2003.

MICHAEL BRILLON,
By His Attorney:

_____
Kathleen M. Moore, Esq.

Cc: Michael Brillon
Brian Marthage, Deputy State's Attorney

IN THE SUPREME COURT OF THE
STATE OF VERMONT

STATE OF VERMONT

v. DOCKET NO. 2005-167

MICHAEL BRILLON

MEMORANDUM IN SUPPORT OF
MOTION FOR REARGUMENT

NOW COMES Appellee State of Vermont, by and through Erica Marthage, State's Attorney for Bennington County, and hereby moves this Honorable Court to grant reargument in the above-captioned case pursuant to Rule 40 of the Vermont Rules of Appellate Procedure.

Appellee asserts that the Court has overlooked or misinterpreted important facts in its decision that bear heavily on the outcome, and further asserts that the Court has misapplied relevant case law. Accordingly, reargument is appropriate in this case and should be granted under Rule 40.

I. Mistakes of Fact

The Court made a significant error of fact in its calculation of time and in attributing delay to the

state. Much of the time that the Court attributes to delays by the state (with a small "s") were in fact delays caused by Defendant and Defendant's counsel, who, in good faith, diligently filed numerous pre-trial motions on Defendant's behalf that, by necessity, delayed the trial.

* * *

The Court appears to charge the delay from July 2001 through June 2002 against Defendant, Opinion at ¶ 31, leaving only the period from July 2002 through June 2004 in issue. From July through October 2002 the case proceeded toward trial. The case was to be set on the October jury draw list. On October 22, 2002, Defendant filed a motion to dismiss his counsel. New counsel was assigned in November, and filed a motion to enlarge time on February 26, 2003. Clearly, all of the time from July 2002 until new counsel was able to get up to speed on the case should be attributed to Defendant.[1]

Defendant filed a pro se Motion to Dismiss for Lack of Prima Facie Case on April 23, 2003, and a second Motion May 7, 2003. The State responded to defense motions on May 12, 2003. The court scheduled these Motions for hearing, but defense eventually withdrew those motions on September 8, 2003. The docket does not indicate why defense withdrew these motions. Again, this delay should not be attributed to the state because it demonstrates that the case was not laying dormant, but rather was being litigated.

Once a new lawyer – Defendant's sixth – was assigned in August 2003, she, too, needed time to prepare the case. While the new lawyer took seven months before she filed her Motion in Limine in February 2004, certainly some of this time was spent getting up to speed, and some time was spent preparing the Motion in Limine. All of that time that counsel spent diligently preparing the case should not be charged to the state. Defendant's sixth counsel then prepared a litany of motions which she filed in April and May of 2004, including a Motion to Compel Discovery filed on April 26, 2004, a Motion

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[1] In Defendant's motions to dismiss both his first and third attorneys, he references the need to speak to "his witnesses." It is significant to note that Defendant called no witnesses at trial, nor did he (or anyone on his behalf) file a witness disclosure with the court after July 2002.

* * *

to Order DOC to Maintain Defendant in MVRCR filed on May 12, 2004, a Motion to Bifurcate filed on May 26, 2004, a Motion in Limine filed on May 26, 2004, and Defendant's Objections to State's Rule 26 Notices filed on May 28, 2004. Clearly, throughout April and May, and then through the trial on June 15, 2004, Defendant's counsel was exceedingly diligent, and this time, as well, cannot be charged to the state.

Quite simply, there is nothing that the trial

court could have done to move this case along any quicker, other than to deny Defendant's many motions to change his trial counsel. Accordingly, any delay in bringing this case to trial should not be charged to the State.

Also, the Court notes in ¶ 9 that the second degree aggravated domestic assault charge was dismissed. This was the charge that Defendant was eventually convicted of and sentenced on, giving rise to this appeal. The court misstates the record where it indicates this charge was dismissed. Appellee requests that the Court's opinion be corrected on this important point.

II. Mistakes of Law

Appellee asserts the Court misconstrued or overlooked relevant law in: (A) factoring defense motions and other tactical delays against the State and not the Defendant, and (B) finding substantial prejudice from Defendant's pretrial incarceration, when he was also being held without bail on an unrelated charge.

A. The Court's Opinion Fails to Acknowledge that Defendant is Responsible for Delays Caused by Defendant or Requested by his Counsel.

This Court should grant reargument under V.R.A.P. 40 because the Court made errors of fact regarding the reasons for the pretrial delay and misconstrued the applicable law. The Court's analysis

holds that everything after June 2002 weighs against the State

* * *

in determining whether a violation of Defendant's speedy trial right occurred, Opinion at ¶ 32, but this analysis ignores the fact that much of the delay was caused by Defendant's conduct in firing and threatening his attorneys, the time it took for new attorneys to get up to speed, and the continuances and motions filed by Defendant pro se, and on Defendant's behalf by his various attorneys.

Even if we were to accept the Court's analysis that the state is responsible for public defender delays, the only delay that could properly attributable to the State under a Sixth Amendment speedy trial analysis is from June 2002 to August 2003. As set forth above, supra at 1-2, the delay between October 2002 and August 2003 should be charged against Defendant for his conduct in firing or threatening assigned public defenders. See, Batts v. Commonwealth, 2005 WL 3500779 (Ky.) (finding that delay of over four years did not violate defendant's Sixth Amendment right to speedy trial; although delay was presumptively prejudicial, delay was due in large part to defendant's difficulties with counsel, which led to appointment of four different attorneys.).

Further, Defendant should be held responsible the period of time from August 2003 to June 2004 because his sixth appointed counsel was getting up to speed on the case, preparing various motions and

preparing for trial. Attorney Katherine Moore assumed responsibility for Defendant's case on August 1, 2003. There is no record that the continuances she requested thereafter were either unwarranted or unreasonable, nor is there any indication that Defendant opposed them. As discussed, supra, Attorney Moore filed several motions on behalf of Defendant, including a Motion to Dismiss, Motions in Limine, a Rule 26 Notice, a Motion to Bifurcate, and objections to notices and motions

* * *

filed by the State. All of these filings indicate that Ms. Moore worked diligently to bring this matter to trial.

"Normally, the period from when a defendant files a motion through the trial court's decision on it is also excluded from the tabulation of delay." State v. French, 152 Vt. 72, 76 (1989) citing, inter alia, State v. Yudichak, 151 Vt. 400 (1989). This includes requests for continuances. Barker v. Wingo, 407 U.S. 514, 539 (1972); see also, United States v. Lavanture, 102 Fed. Appx. 198 (2nd Cir. 2004) (finding that ten-month pretrial delay did not violate defendant's right to a speedy trial; reasons for the delay were all attributable to motions filed by the defense and to adjournments required to allow multiple new defense counsel to familiarize themselves with the case and prepare for trial.); United States v. Lam, 251 F.3d 852 (9th Cir. 2001) (holding there was no violation of Sixth Amendment speedy trial right from defendant's 14 ½ month incarceration prior to pleading guilty, even though defendant repeatedly requested trial; delays

were in large part attributable to defense counsel's requests for continuances due to complexity of case, defendant waited until after conclusion of trial to file motion to dismiss indictment, and delay did not prejudice defense.).

In addition, this case represents an extraordinary situation where the vast majority of pretrial delay was caused by the Defendant firing his first court-appointed counsel, threatening the third, and causing the withdrawal of still another by making unreasonable demands. In his concurring opinion in Barker, Justice White recognizes that "unreasonable delay in run-of-the-mill criminal cases cannot be justified by simply asserting that the public resources provided by the State's criminal justice system are limited and that each case must await its turn." Barker v. Wingo, 407 U.S. at 538 (White,

* * *

J., conc.) This case, however, is not run-of-the-mill. Numerous states have recognized that delay attributable to "exceptional circumstances" – unique, nonrecurring events – is fundamentally different than delay caused by docket congestion or public defender caseloads. Many states have codified this consideration into state speedy trial statutes, and Appellee asserts that it was error not to consider this line of cases. See, e.g., People v. Pharr, 612 N.Y.S. 2d 115 (N.Y.A.D. 1 Dept., 1994); State v. Wilson, 362 So.2d 140 (Fla.App., 1978).

Finally, the Court's reliance on People v.

Johnson, 26 Cal. 3d 557 (Cal. 1980), is misplaced. To begin with, although the California Supreme Court took issue with how the trial court handled defendant's speedy trial claim, the court affirmed the conviction. Id. at 580. More importantly, however, is the fact that the court's decision was based on a state statute that, the court explained, permitted defendants to be re-prosecuted despite speedy trial violations, "unless the charge has been previously dismissed on such grounds." Id. at 573. As the court noted: "The dismissal of charges when a defendant is denied his right to a speedy trial whether because of conflicting obligations of appointed counsel, congested court calendars, or other causes will not result in defendants' escaping trial for serious crimes they may have committed." Id., (emphasis added). Under the California law, and under the Court's opinion in Johnson, what happened here -- allowing a defendant to walk free and depriving the State of the opportunity to re-prosecute him -- would never happen, unless this was the second time that defendant's speedy trial rights were violated.

For all of these reasons, the State urges the Court to grant the instant motion and permit reargument on these issues.

* * *

B. Since Defendant was Being Held Without Bail on a Separate Charge, He was not Substantially Prejudiced by the Pretrial Incarceration.

In addition, for a significant period of pretrial incarceration, from May of 2003 until at least February of 2004, Defendant was being held without bail on an unrelated felony VAPO charge.[2] As such, he cannot claim substantial prejudice due to anxiety related to his incarceration in this case. Several cases cited by the Court support this argument. See, e.g., State v. Stock, 140 N.M. 676 (N.M. App., 2006), citing Salandre v. State, 111 N.M. 422, 430 (N.M. App. 1991) (holding that restraints on the defendant's liberty were not "oppressive" where he was under restrictions of bond for only about a month after being released from incarceration on other charges); United States v. Grimmond, 137 F.3d 823 (4th Cir. 1998) (holding that pretrial incarceration cannot be deemed oppressive, for purposes of establishing prejudice in support of claim that Sixth Amendment speedy trial right has been violated, when defendant is lawfully incarcerated for reasons not related to pending charges and makes no credible showing that either his present or potential sentence will be substantially affected by delay.); State v. Palmer, 723 P.2d 956 (Mont., 1986) (holding that where defendant was already incarcerated, there was no prejudice from pretrial incarceration); State v. Alcaraz, 590 N.W.2d 414 (Neb. App., 1999); Ex parte Anderson, --- So.2d ----, 2007 WL 2405673 (Ala., 2007).

Reexamining the fourth Barker factor in light of this fact, the prejudice due to Defendant's incarceration and his pretrial anxiety from this offense is rather limited. As

[2] As the court notes, the May 2003 charge of felony violation of an abuse prevention order proceeded to trial in February 2004.. However, the court declared a mistrial when Defendant's counsel filed an oral Motion to Withdraw during the trial. The motion was granted and a mistrial declared because Defendant insisted on perjuring himself. Also, in its written order on the Motion to Dismiss on dockets 509-5-01, 957-7-01, 959-7-01, 382-4-03 and 929-7-00, the district court analyzed the speedy trial claim and found no violation because Defendant's actions caused the delay and there was no actual prejudice.

* * *

this Court acknowledges in its opinion, Defendant's own actions are responsible for him being incarcerated for the first year in this case. Opinion, ¶ 45. The Court did not address the fact that from May 12, 2003 until February 2004 (and beyond) Defendant was being held without bail on a separate, unrelated case. Thus, the Barker analysis of whether Defendant was subjected to oppressive pretrial incarceration and anxiety related to that incarceration must address only the period between June 2002 and May 2003. Appellee asserts that this eleven-month period alone is insufficient to establish prejudice justifying dismissal. See, United States v. Paul, 326 F.Supp.2d 382 (E.D.N.Y. 2004) (holding that while a lengthy period of incarceration is relevant to the prejudice analysis of a Sixth Amendment speedy trial claim, it is

not dispositive; of greater importance is the extent to which that incarceration impaired the ability to mount a defense against charges in the indictment, and absent a finding of such impairment, incarceration alone cannot sustain a finding of undue prejudice.); United States v. Teyibo, 877 F.Supp. 846 (S.D.N.Y. 1995) (finding that Defendant failed to demonstrate any prejudice as a result of delay even though defendant was incarcerated during 18-month delay between indictment and trial and asserted speedy trial right several times during delay; pretrial delay was attributable to defendant's dissatisfaction with appointed counsel, continued assurances to court that private counsel was forthcoming, and his indecision whether to accept newly appointed counsel or proceed pro se.).

* * *

III. Conclusion

Appellee's Motion for Reargument should be granted because the Court overlooked certain material facts and misapplied the law in reaching its decision.

Further, the Court should reconsider its decision in light of the public policy concerns that this decision creates. The Court's decision will have a detrimental effect on the relationship defendants have with their public defenders. Under the decision, defendants will now be encouraged to object to continuances requested by their counsel, even if the continuances are in the client's interest. Indeed, defendants will be encouraged to change counsel as often as possible in

the hope that mere delay will force their freedom.

The Court's decision will have a chilling effect on replacing public defenders when a defendant seeks new counsel. As a result of this decision, the State must now oppose requests for a change of counsel because it will necessarily cause a significant delay. Similarly, courts will hesitate to assign new counsel when defendants request it.

Lastly, the Court's decision will push poor defendants – those who have public defenders – to trial even though their counsel may need more time to prepare a defense, while allowing wealthier defendants who retain private counsel to request continuances without consequence. Prosecutors and the courts can no longer agree to reasonable continuances requested by public defenders due to concern that the continuances may be applied against the State and the case dismissed on speedy trial grounds. The end result is that poor defendants may be pushed to trial before their counsel is ready, while wealthy defendants will have all the time they require.

* * *

DATED at Bennington this 27th Day of March, 2008

Erica Marthage
State's Attorney
150 Veterans Memorial
Drive, Ste. 10
Bennington VT 05201

Michael Brillon
MVRCF
167 State St.
Rutland, Vt.
05701

Your Honor,

I have several matters before the court, and am represented by the office of the public defender, in particular attorney Richard Ammons.

I have been held without bail for almost 60 days now, and during that 60 days there have been between 8 and fifteen phone calls, between myself and my family, and not one call has ever been returned to me or to my family.

There have been several letters written, requesting discovery and other pertinent information regarding my case, and to this day I have seen nothing at all.

This amounts to constructive denial of effective assistance of counsel. I have stressed that I am NOT waiving the 60 days in my case. The time is rapidly approaching when this matter should be coming before the court, and it appears that nothing is being done in preparation for my defense.

I am forced to object to the court this blase' approach by the public defenders office. Significant liberty interests are at stake. I have yet to have a bail appeal or an evidentiary hearing to support such a

motion. In fact, I don't even know when I am next scheduled to make an appearance.

I ask the court merely to take note of my objection, in the interest of preserving the record.

Sincerely,
Michael Brillon
09-20-01

8-25-02

Mr. Westly,

about a month ago you gave defense an extension for discovery purposes. I met my new attorney Mr. Donaldson a couple of moments prior to going into your courtroom, he had informed me that he has never done a life penalty case before. according to him he has done 5 aggravated domestic assault cases which have all resulted in convictions...

this information does not inspire much confidence in his ability, I fully understand that I have no right to pick my own attorney at the tax payers expense and that has never been my intention, nor has it ever been my intention to delay any court proceedings as you know I have been in prison for 14 months and any normal person would never delay the possibility of getting out of jail, and I will win if I ever get an attorney that will work with me...

my discovery has never been completed by any of my three different attorneys, and now I am running into the same problem with Mr. Donaldson that I did with the other attorneys he will not respond to my numerous attempts to reach him by phone and he hasn't contacted any of my witnesses if you call here at the correctional center and ask for staff Joan Eckley she will verify my attempts to contact Donaldson (she made the phone calls) I have read several letters back from the professional conduct board and the Vermont bar stating that Mr. Donaldson is not taking any more cases from the assigned counsel program which really

concerns me.

nor has he contacted me after the court session, I am familiar with the list of conflict attorneys and I brought this to your attention at my motion hearing while trying to have you appoint another attorney to my case, I knew who was next on the list for attorneys and brought this to your attention also although Mr. Donaldson seems like a very nice person he is not capable of doing a life penalty case and he has said as much to me....

please give this case the attention it deserves and appoint an attorney with the experience and professionalism it warrants as it is a life penalty case and not a speeding ticket, I am not trying to be a smart ass to you I just cant take too much more of this, why am I even going to trial bill Wrights office knows that I was attacked with a baseball bat theres no denying it, why was she not charged with aggravated domestic assault? is it because she is a women? I just need my life back or an end to it I cant take too much more of sitting in jail while my life passes me by month after month because of a vindictive prosecutor and a broken system.....

sincerely

Michael Brillon

OFFICE OF THE DEFENDER GENERAL

State Office Building
120 State Street
Montpelier, VT 05620-3301

Phone (802) 828-3168
Fax (802) 828-3163

Office Location:
14-16 Baldwin St. -
Montpelier

January 15, 2003

Matthew F. Valerio, Defender General

Honorable Karen Carroll
Bennington County District Court
200 Veterans Memorial Dr., Ste. 13
Bennington, VT 05201

Re: State v. Michael Brillon, Docket Nos. 509-5-01,
928-7-00, 957-7-01 BnCr

Dear Judge Carroll:

In response to the Entry Order dated January 8, 2003, please be advised that we are designating Attorney David Sleigh to be assigned to the above-entitled matters. It's our understanding that these cases are all habitual offender charges. Therefore, they qualify for assignment to a Serious Felony Unit. On November 26, 2002, we were notified by the court of the need for assignment of counsel in these matters. After conferring with the clerk on that day and the next day, we advised the clerk that these cases should

be assigned to David Sleigh. Matt Harnett also holds a contract to provide serious felony unit services in the southern part of the state. However, due to a conflict of interest with Mr. Brillon, he is unable to provide representation in these matters. On December 2, 2002 we notified Mr. Sleigh that these cases would be assigned to him by the court. Apparently the Court never sent Mr. Sleigh notice of assignment prior to the status conference. We are not aware that Mr. Sleigh has any conflict of interest in these matters.

I am very sorry for any confusion or inconvenience this may have caused.

Very truly yours,

Matthew F. Valerio
Defender General

MFV/lae

cc: David Sleigh, Esq.

Deputy State's Attorneys
John T. Lavoie, Esq.
David R. Fenster, Esq.
Brian K. Marthage, Esq.
Erica A. Hunter, Esq.

Victim Advocates
Tammy R. Loveland
Erin M. Tatro

STATE OF VERMONT
Bennington County State's Attorney's Office
William D. Wright
200 Veterans Memorial Drive, Suite 10
Bennington, Vermont 05201
(802) 442-8116
FAX (802) 447-2775
TTY Available

Ms. Kimberly Phillips
Deputy Court Clerk
Bennington District Court
Bennington, VT 05201

Re: State v. Michael Brillon
Docket 957-7-01 Bncr

Dear Kim:

Regarding David Sleigh's Motion to Continue various deadlines in the above-captioned docket, I have no objection.

Sincerely,

Brian K. Marthage

cc: David Sleigh, Esq.

Sleigh & Williams
ATTORNEYS AT LAW
364 Railroad Street, Suite E
St. Johnsbury, Vermont 05819
TELEPHONE: 802-748-5176
FAX: 802-748-6618
EMAIL: erin@sleighandwilliams.com
linda@sleighandwilliams.com

April 10, 2003

Michael Brillon
Marble Valley Regional Correctional Facility
167 State Street
Rutland, VT 05701

Dear Michael:

As a result of modifications to our firm's contract with the Defender General, we will not be representing you in your pending case. Lora Evans of the Defender General's office is working to secure new counsel for you.

Ms. Evans may be reached at (802) 828-3168 if you have any questions.

Sincerely,

David C. Sleigh

cc: Lora Evans
Bennington District Court
Bennington State's Attorney

OFFICE OF THE DEFENDER GENERAL

State Office Building
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Montpelier, VT 05620-3301

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14-16 Baldwin St. -
Montpelier

June 20, 2003

Matthew F. Valerio, Defender General

Kimberly Phillips, Deputy Clerk
Vermont District Court
Bennington Circuit
200 Veterans Memorial Drive, Suite 13
Bennington, VT 05201

Re: State v. Michael Brillon, Docket Nos. 928-7-00,
929-7-01, 957-7-01, 959-7-01, 509-5-01 Bncr

Dear Kim:

This letter will confirm our telephone conversation yesterday. We have received authorization and funding from the legislature to implement a fourth serious felony unit during FY 2004. Kate Moore, Esq. will be hired as the fourth SFU defender August 1, 2003. She will be available to accept assignment at that time of Mr. Brillon's three habitual offender cases that are conflicts for public defense, and that have

previously been assigned to David Sleigh. It is my understanding that there is a recent habitual offender charge assigned to public defense. That case is not a conflict for public defense, and Mr. Bragdon will continue to represent Mr. Brillon on that case.

We have received notice of the motion hearing scheduled for July 21, 2003. Matt Valerio, Defender General, intends to appear at this hearing by telephone, if that is agreeable with the Court.

Sincerely,

Lora A. Evans
Business Manager

cc: Brian Marthage, Esq.
Kate Moore, Esq.
Matthew F. Valerio, Esq.
Michael Brillon

STATE OF VERMONT
BENNINGTON COUNTY, SS.

BENNINGTON DISTRICT COURT

STATE OF VERMONT

-v-

DOCKET NO. 957-7-01

MICHAEL BRILLION

- - - - - - - - - - - - -

P R O C E E D I N G S

HEARING: Motion to Continue

HELD: Friday, February 22, 2002

BEFORE: The Honorable Karen R. Carroll

APPEARANCES:

BRIAN K. MARTHAGE, ESQ., of the Bennington County State's Attorney's Office, 200 Veteran's Memorial Dr., Ste 10, Bennington, VT 05201-0172, on behalf of the State of Vermont;

RICHARD F. AMMONS, JR., ESQ., of the Bennington County Public Defender's Office, 411 Gage St., Bennington, VT 05201, on behalf of the Defendant.

COURT REPORTERS ASSOCIATES
117 Bank Street
Burlington, Vermont

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EXHIBITS

No. Description Page

(No exhibits.)

* * *

FRIDAY, FEBRUARY 22, 2002

[Tr. 3] THE COURT: We are in the Bennington District Court in the matter of State versus Michael Brillion. It's Docket Number 957-7-01, and he is with us through the interactive television. Mr. Marthage is here and Mr. Ammons is here, and I scheduled this hearing on short notice due to a motion filed today by your attorney, Mr. Ammons, to continue the jury draw and trial scheduled for next Tuesday.

As you know, the matter is scheduled for next Tuesday. I also understood that there had been a pro se motion or two filed which I haven't seen because apparently they were sent directly to Mr. Ammons by the Court, but we'll talk about that in any event, but we'll hear Mr. Ammons at this time about the request to continue the trial.

MR. AMMONS: Thank you, your Honor. With regard to the pro se filings, they are not as yet filed so

if at such times we decided to file them, we will. Mr. Brillion is represented by counsel being myself. I am licensed in the State of Vermont to practice law, and I have been appropriately assigned as his attorney. He has had the benefit of some assistance by other, as I refer to in the motion, unlicensed

* * *

[Tr. 4] counsel, and there have been some papers mailed to the Court but they are not properly before the Court.

They may be at some time in the future but not presently, your Honor. Presently what we have is what I filed today which is my second motion to continue the jury draw and trial that's scheduled for next week. As your Honor knows, I filed previously on January 17, I filed a motion to continue discovery and a tentative February draw. When I saw that we had been placed on the tentative list for February, I know that the State has filed prior to that back in December they were very interested, very vigorous in getting the case on as soon as possible.

I know in my conversations with Mr. Marthage he was, I would say, very interested in going forward as soon as possible, and my concern which is probably obvious was that I wanted to be sure that I had the benefit of as much discovery as possible in the context of a life penalty case, and I would certainly want as much discovery as I could possibly legally, ethically have.

In any case, but, obviously, the vagaries of, you know, the business and the efficiency that's available to us or the level of efficiency that's permitted given the volume of matters that we have to

* * *

[Tr. 5] deal with in less important cases is understandably -- and I am not saying appropriately -- but understandably somewhat diminished. But in a life penalty case, I think we should stretch our own limits and our resources to the extent that we are able to where it's appropriately, and, obviously, the Court has the discretion in deciding what's appropriate. I filed a motion on the 17th for a continuance of discovery of tentative jury draw to at least April. That would give me an opportunity to finish the depositions; make what requests I have in the context of depositions because all I had to that date was just my client's representations to me about the state of the environment of the case.

And by that I mean to say is the family. This is kind of a family case.

THE COURT: You mean depositions had gone on prior to you taking the case?

MR. AMMONS: No, no. I came to the Public Defender's Office January 1 and was assigned on this case the end of -- I mean, July 1 and got this case the end of July, so this has been my case right from the beginning and, you know, the Court quite reasonably should expect me to be diligent and get my case ready

to go, and seven or eight months is not an unreasonable amount of time to do it. Certainly under any ordinary

* * *

[Tr. 6] circumstances, but what I'm saying here is that I didn't come in under ordinary circumstances, first of all. I came into a situation in the Public Defender's Office that I think even Mr. Marthage would agree was disarray.

I mean, the fact that Public Defenders are under funded and under staffed is a complaint that the Court doesn't need to hear me make. That goes without saying. We are two full-time attorneys handling a very large case load. The attorney who had my position prior to my arrival allowed his case load to sit, quite frankly, and I picked up that entire case load as well as taking my equal portion of the full-time attorney on-going distribution from the day I arrived. I am not complaining about that, Judge. I have just had to work extremely hard to even get to the position I am in now, which seven months later is still greater than equal proportion to my colleague, Mr. Bragdon, (inaudible) complaint this is what had to be done. This was the nature of our circumstance. I understood it coming in.

I made a number of these kinds of issues and concerns known to various judges here at the court. Mr. Marthage has heard this argument in the past from me asking for additional time to do things, and I have been getting, I think, some consideration from the Court with some nudging to make sure that I'm

not just relaxing and

* * *

[Tr. 7] not getting my job done. Here we are in this case, Judge, that's the context in which --

THE COURT: Before you leave that, let me ask you this. Have you sought any relief from the Defender General?

MR. AMMONS: Not formally, and I am at the point and have been at the point for a few weeks where I have considered doing that, but I happen to know that the Defender General's resources are so limited right now that I don't know that -- I don't know that they would be available. I think what I need to do is what I have been doing which is working more days than there are and more hours than there are to catch up, and, again, I am not complaining. That comes with the territory. I accepted that when I took the job. I expect it to smooth out somewhere down the road. It hasn't happened entirely yet. It's getting more manageable now. I currently have 174 clients, 331 charges, 55 of which are felonies. That's a pretty healthy case load I am told.

THE COURT: Let me ask you this. Paragraph 7 you say on the eve of trial you are still scrambling to acquire significant portions of discovery in the case, and my question to you is are you implying that you requested discovery from the State that is not

* * *

[Tr. 8] forthcoming, or it's just your own investigation that you're trying to conduct?

MR. AMMONS: Well, paragraph 7 is the former and not the latter, but both the former and the latter are important, and your Honor has just taken me from my complaints about the environment I am working in to the specifics of the instant case. The instant case we do have some outstanding discovery, as Mr. Marthage knows. We, I think, concluded our deposition of Michelle Tatro who is the putative victim in the case. I think it was on the 14th, if I am not mistaken, when we did the deposition and in the court she was represented by counsel.

This was the -- we did her original deposition in October, and in the course of that deposition I began to inquire on a good faith basis as to her use and abuse of prescription and non-prescription drugs so as to ascertain as much as I could about her history and her present condition or condition at the time of the incident, and also asked her, well, to ascertain exactly that; what her position would be vis-a-vis drugs at the time of the incident.

I think I was quite properly objected to by Mr. Marthage where he said this is an individual who has a Fifth Amendment right against self-incrimination and

* * *

[Tr. 9] pursuing this at this point wouldn't be fair to here. Well, I'm not her attorney, neither is Mr.

Marthage. She certainly has a right if she elects to exercise it to seek counsel which she did. I didn't persist at that point. Brian and I agreed, okay, at a later date we'll finish the deposition after she has had the benefit of counsel.

So on the 14th she arrived with Jim Malady to conclude this deposition and we had a very narrowly scoped deposition with regard to her history as much as I was allowed to inquire, and also with regard to her use contemporaneous with the events that are alleged here through the present time. In the course of that, I requested and was granted permission to receive from her counsel her medical record within limits, and the limits -- I don't have the limits in mind specifically right now but maybe Brian does. As well as her -- to include her medication issues and drug use to the extent it was within the record, so I was interested in all of that.

In the course of -- so we're still waiting for that. We have yet to receive that, Judge. I mean, I could be handed that today and I would be delighted to receive it today, but I won't be able to have it evaluated today. I am not a doctor and I don't know what

* * *

[Tr. 10] it's going to say and what's in it, but I do need some time to review that.

THE COURT: This is her medical record?

MR. AMMONS: Yes. And in the course of that

discussion of this aspect of the case with my client, which is another whole issue, being able to communicate with my client. This is another matter.

There have been some witnesses, individuals, who have presented themselves not directly to me but to my investigator who purport to have information that purports to be relevant to the case. I, frankly, am from what I'm hearing about it, I think there is some relevance to it, but I think there are legal issues. Not only are there legal issues with regard to this information that may be available from these witnesses who may come forward and testify, but there are some ethical issues with regard to my using these people as witnesses, and beyond that, it would be, I think, inappropriate for me to elaborate further. At least at this point.

THE COURT: But your point about them is they may be?

MR. AMMONS: They may be relevant and, I may need to call them in defense of my client.

THE COURT: And how recently --

* * *

[Tr. 11] MR. AMMONS: They came to my attention within this past week. Now, I thought that there might be evidence of this nature available earlier. I anticipated this type of evidence earlier but I did not -- I was not aware that it was actually available. It occurred to me it would be good to know if I could have

this evidence, but now I am aware that this evidence is available in some form. Whether it's an appropriate form remains to be seen. It's my duty to investigate that opportunity to ascertain whether it would be legally relevant and whether it would be ethically appropriate for me to even go forward with it for a variety of reasons that I would prefer not to discuss at this point.

So I think, you know, we are doing a deposition this afternoon of one of our witnesses. So far the only witness of ours besides Mr. Brillion, should he testify. Unless we are going to be calling one or more of these other people.

THE COURT: A witness that you had previously (inaudible)?

MR. AMMONS: No. Had not listed. These are people --

THE COURT: The depo today?

MR. AMMONS: Yes.

THE COURT: When did this --

* * *

[Tr. 12] MR. AMMONS: We advised Mr. Marthage of this back while we were doing depositions.

MR. MARTHAGE: He was disclosed on February 13, your Honor.

MR. AMMONS: February 13 I gave him a formal notice, because it was at that point in time that I had his -- I wasn't sure I wanted him as a witness until I knew what he had to say was relevant. I didn't want to just list him not knowing I could call him. He was away on vacation. He is a corrections officer at (inaudible) where Mr. Brillion is, and I wanted to have the benefit of what he had to say before I listed him.

I made Mr. Marthage aware of this. He came back from medical leave.

Mr. Smith, my investigator, went and took his statement. I have a copy of that statement. I attached that to my formal notice and gave it to Mr. Marthage and that was, as he says, February 13th. That sounds right. That was the soonest I could get that in.

With regard to these other witnesses, we need to see what we can do.

THE COURT: So your general argument about your case load and what you have been up against?

MR. AMMONS: Yes.

THE COURT: To sum it up, what is it that

* * *

[Tr. 13] you need to do to be prepared for the trial?

MR. AMMONS: For this case?

THE COURT: For the trial. Other than investigating the witnesses, doing the deposition today.

What about your case load that you've mentioned, what has that prevented you from doing (inaudible)?

MR. AMMONS: In the past or --

THE COURT: No. What is it that you need to have done before Tuesday other than investigate these witnesses?

MR. AMMONS: I also have a call to Dr. Carolyn (inaudible) who was the physician who treated Ms. Tatro. She was originally listed as a State witness by Mr. Marthage and at some point in time she left the area. She went to (inaudible), either north or south. I forget which. And I advised Mr. Marthage that I was going to want to pursue her. Either do a telephone deposition or perhaps, you know, even go there and take a deposition if that would be available if I was able to get the funds from the Defender General to fly there and do it. Mr. Marthage advised me that she was being stricken as a witness.

MR. MARTHAGE: And she hasn't been (inaudible) at this point in time?

MR. AMMONS: Well, actually, I accept

* * *

[Tr. 14] that. I did get a notice from Mr. Marthage in January that identified her as a witness and then identified her medical record as disclosure, formal disclosure, and I spoke to Brian about that. I said, well, is she a witness or is she not a witness; and he said she's not a witness. Fine. That's okay with me. She's not his witness. I want to talk to her. I tried to reach her and I got her carrier. Her medical malpractice carrier in Wisconsin who would not tell me how I could make contact with Dr. Kenyon and said, well, can you talk to me first and tell me what the nature is of your inquiry, and I said, well, it's a criminal proceeding; I'm not looking to bring an action for malpractice. I'm not trying to put her on the block. I want to depose her, and she said, well, I will contact her and she can contact you, and I said I appreciate that. Well, that hasn't occurred.

THE COURT: How long ago was that conversation?

MR. AMMONS: That was -- It was shortly before here that I moved the Court for a continuance. The 17th of January. That was my first motion that your Honor had. That's probably the State or summary of the state of the case that I need to pursue. I have got a week of vacation starting the first of March. I would

* * *

[Tr. 15] really like to have that vacation so I've asked the Court to continue this to the April draw. Obviously, that means I have to get some things done in that week as well; and, in fact, I have got possibly

two trials back to back that I may have to try the week I come back according to the list, so I may be -- maybe it won't work out that way. One of them will definitely go the week I come back, and then I've got two back-ups.

THE COURT: Are you talking about the second week of March?

MR. AMMONS: Yes. And in asking that Mr. Brillion's case be brought over to April, it's my sense in asking for that that the trial itself will likely be late in April if the draw were early, and if that were so, I think that that should certainly give me enough time to accomplish what I need to accomplish. Beyond that, Judge, you know, the only other difficulty I have if that's not enough of a difficulty is in communicating with my client. And it's not that I can't talk to him and he can't talk to me. I believe there is a level of trust between my client and myself. We are able to communicate with each other but for the fact that he's in jail and I can talk to him on the phone, but there are limits to that in terms of sharing material. He's got as much material as I can send him and that works to an

* * *

[Tr. 16] extent, but he's in an environment that's not a very healthy environment. I can go to the jail and sit where he's sitting right now which we've done, but I can't do that very often because I don't have the time to do it. Steve Smith gets to do it more often than I do, and what I get is secondhand transmissions of

information which, frankly, don't work very well, so that's the other burden that, you know, I have in working down my case load and I really don't like whining about it so I would just finish my comments this way, Judge, having whined for the past five minutes.

I'll simply say that I'm asking the Court to -- and I mean this with all due respect. I'm asking the Court to show me the respect of having the discretion and the capacity to make a determination for myself when my case is ready to go forward and when it's not ready to go forward, and, you know, my client can't do that; and with all due respect to Mr. Marthage whose skill I respect, he can't do it, either.

Your Honor, with all due respect to the Court, I don't think the Court can do it. The Court has its interests and, obviously, wants to light a fire where and when it can because the case load is huge for everybody and things need to move. This is a life case. Even though the facts are somewhat in the scheme of things

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[Tr. 17] innocuous, we're talking about at worse case scenario, he slugged his girlfriend. But he's looking at a life penalty for that, and he's got two more cases down the pipe with life penalties attached to them.

The State wants him in jail for a long time. He's entitled to a vigorous -- all my clients are entitled to a vigorous, zealous defense. What do they get? They get

as good as we have to give them. But Mr. Brillion in this case deserves that much and more, and I'm asking your Honor to give me this continuance, and I won't expect it to be beyond April even though that will be tight but I think I can accomplish that.

THE COURT: All right. Mr. Marthage?

MR. MARTHAGE: Well, I don't honestly think that it's up to the defense counsel to run the Court's schedule. I think that would be entirely inappropriate. Just to give the Court a little background, in December I moved to put this case on the February draw because he's incarcerated. There are two other cases that he has that are both habitual offender cases, and it's important to get those resolved in the near future because each case has to be tried before a different panel and this is the case -- this was the case that he was being held on. This case has priority over all others.

* * *

[Tr. 18] We held a conference in January on the 23rd where Mr. Ammons raised the exact same issues he's raising here today before the Court. I haven't had time to investigate. There might be more witnesses. There is at least one more witness that I have to disclose. We have to do depositions and the Court at a point in time said you have until February draw to have this case investigated and complete. It's been outstanding for six months now. You've got another seven weeks to get your house in order. Your Honor, it's the same thing we have here today. I mean, look at

Mr. Ammons' motion, paragraph 7. Let's see. He talks about for the last 10 days he's been the only counsel full time at the Bennington Public Defender's Office. He's had this case for eight months to prepare it. The last ten days doesn't matter.

In another portion of his motion he talks about the fact that on the 23rd of January, he anticipated that he would be disclosing additional witnesses. All right. He has disclosed one witness on behalf of the defense at this point in time, and now he comes to the Court and says, well, we've just learned about more witnesses that the defense is going to need to disclose. It's the same thing that he presented before the Court on the 23rd. With regards to, first of all, I want to say

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[Tr. 19] that there are no outstanding discovery requests that have been lodged with the State at all. Correct me if I'm wrong.

MR. AMMONS: At the deposition I requested production of the medical records.

MR. MARTHAGE: And those are not in my control. Mr. Malady indicated he would produce those upon you filing a written request. She was deposed last Friday. I received a copy of the written request Thursday.

MR. AMMONS: So there is the answer to the question. I wrote the letter. I delivered it to Mr. Malady, and I copied it to Mr. Marthage. I don't think

there is a better way to do it.

MR. MARTHAGE: That was five days after the deposition. Mr. Malady indicated that if he had the request immediately, he could get the records to (inaudible).

MR. AMMONS: No, no. Not so. I faxed it. No, no.

MR. MARTHAGE: Excuse me. Excuse me.

THE COURT: Wait just a second. Go ahead.

MR. MARTHAGE: So there are no outstanding discovery requests with the State. All of

* * *

[Tr. 20] the testimony in this case indicates that there is absolutely no issue with regards to illicit drug use by Michelle Tatro or anyone. She denied from three years to date using any illicit drugs including on the night in question. What Rick's really going on is a fishing expedition to determine whether there is something that he can use to impeach the witness and it ain't there. All right? Now, he may have the right to obtain those medical records because Mr. Malady gave him access to those, but the fact is he could have gotten access to those a long time ago, your Honor.

He has waited and waited and waited and waited, even past this time when the Court said on the 23rd of January you need to get your house in order.

He comes now before the Court saying the same thing. The very same thing. It's frustrating to the State, your Honor. The State has put a lot of time and effort to get this case in order, as this Court directed, for a jury draw at the end of February. It's unfortunate the defense hasn't taken the same opportunity. I mean, he's crying about things he needs to do, yet today he was taking depositions in an entirely unrelated case. A Mr. Miguel Chico, from 9:30 to 1:45 today. Devoted all of his efforts to Mr. Chico's case. Nothing related to Mr. Brillion whatsoever.

* * *

[Tr. 21] He's claiming that, you know, there are additional witnesses to disclose during Michelle Tatro's most recent deposition which would give rise to new evidence in support of defense. Seven days after that deposition, Friday at 2:30, the State receives a motion to continue for a jury draw that's set for the following Tuesday. If they were so important, why couldn't he have gotten that motion in earlier this week? Given the Court more time to consider it. Instead he submits it at the very last moment in the hopes of gaining a continuance.

The State disapproves of the tactics that have been employed here by Mr. Ammons. The State feels that they, unfortunately, are -- I mean, this has been an issue all along whether this Judge will try this case, and since the January hearing on this matter it has been defense's objective in part to have this Judge not hear this case.

Mr. Brillion has indicated to the Court on the record he doesn't want you to try this matter. The State feels that this is just part and parcel of an effort by the defense to have the Court not hear this matter, and it's really inappropriate and the State feels it's very unfortunate. The deposition of today is a witness that was disclosed by Mr. Ammons. The fact that

* * *

[Tr. 22] the deposition is being taken today, there is no prejudice to Mr. Ammons on that. There is none whatsoever. I haven't heard a proffer as to what these new witnesses might say, but the fact that new witnesses are coming to light eight months after an incident has taken place, I mean, Mr. Ammons has indicated he questions the veracity of the witnesses and the ability to use them under the ethical guidelines that he has.

Putting that forward as a wing and a prayer and a hope for getting this Court to continue this case which has been set for trial for so long, the State doesn't feel that's an appropriate way in which to proceed. So --

THE COURT: Let me ask you before I ask Mr. Ammons. Based upon the victim's most recent deposition, was her testimony that she was not using any type of drug on the day of this incident?

MR. MARTHAGE: Her testimony was that she was not using any illegal drugs on the day of this incident. Her testimony was also that she takes 20

milligrams of Celexa on a daily basis.

THE COURT: Which is what?

MR. MARTHAGE: Celexa is an anti-anxiety pill. I mean, if the Court wants some information, the prescription for the Celexa has been longstanding. She has been on that for a period of several years.

* * *

[Tr. 23] THE COURT: All right. You can respond and also tell me why this medical record is so integral to your case.

MR. AMMONS: Well, the access to the records that I could have gotten a long time ago -- I don't know how long ago. In October I requested them, and Mr. Marthage said he would object and so (inaudible) the Court in order to get the records. It seemed to me that before I use my limited time and resources to go after a court order to produce the records, I would want to make sure that they would have some value to me, and I believe that they do have some value to me. The fact that this woman uses drugs for anxiety purposes, which is certainly all by itself very relevant to her capacity to accurately and adequately should she be using an improper dosage or should she be using them non-prescribed.

THE COURT: How do her medical records show she was using them in an improper fashion?

MR. AMMONS: There would be some indication

as to what the proper usage should be.

THE COURT: What the prescription was, but the medical records can't show whether she used them inappropriately or not.

MR. AMMONS: Well, the medical records

* * *

[Tr. 24] can't, but the medical records can tell you how they should be. The witness's testimony (inaudible) tell you how they are being used.

THE COURT: Dr. Kenyon is the one who treated the victim for this Celexa or after the assault?

MR. MARTHAGE: After the assault.

THE COURT: Not the Celexa issue. The assault issue.

MR. AMMONS: There are four or five treatment providers that I identified in my request to Mr. Malady that she identified and apparently that were within the scope of our inquiry. I have a very good reason to believe that she is abusing non-prescription drugs. That would be my proffer. And not just that, but I have very good reason to believe that she is also using, abusing, if you like, non-prescription drugs as well.

THE COURT: So how do medical records get you to that point?

MR. AMMONS: Well, what they do is they establish for me what she should be using and why.

THE COURT: What she already testified to.

MR. AMMONS: She herself.

THE COURT: Right.

* * *

[Tr. 25] MR. AMMONS: I have significant doubt in my mind as to the veracity of her testimony. I can't impeach that testimony absent some indication of what those records say. I have to have those records to be able to do that.

MR. MARTHAGE: I'm not following. He's going to use the medical records to impeach her with regards to what?

THE COURT: Whether she's abusing prescription drugs. That's the proffer.

MR. MARTHAGE: Well, I mean, is he using extrinsic evidence to attack the --

THE COURT: I'm not going to rule on the admissibility right now of medical records for that purpose. That's his proffer of why he needs a continuance, and the Court will keep in mind how relevant that is when the Court makes its ruling.

MR. MARTHAGE: I think we would agree at

this point in time that the record that we have in terms of depositions and discovery does not disclose any abuse of either prescription or non-prescription drugs by the witness, correct?

MR. AMMONS: The record as it stands now.

MR. MARTHAGE: The record as it stands now.

[Tr. 26] MR. AMMONS: I would say the record as it stands now, that's accurate.

MR. MARTHAGE: I think we would also agree that as of October 4, you knew that she was taking anti-anxiety drugs because that's what she disclosed in the first part of her deposition.

MR. AMMONS: That's right. It was at that point that I asked you if you would be agreeable to producing her records that would make clear for me what was prescribed and how appropriately it might be prescribed. If she's diagnosed with something for which she is being treated, that should be indicated in the record. If she's treating herself for something that has not either been --

MR. MARTHAGE: It would not be indicated in the record.

MR. AMMONS: It may or it may not. But I tell you what could be. If I have witness testimony that tells me if I have other evidence that makes clear to or at least is admissible evidence that she's using and

abusing drugs that are not indicated in the record, if she's using and abusing, say, for example, prescription drugs that for which she has not been prescribed, that would go both to her credibility for impeachment purposes and be relevant as to whether or not

* * *

[Tr. 27] she was competent in a variety of ways at the time of the incident.

MR. MARTHAGE: I don't see how the medical records (inaudible).

THE COURT: I'm going to deny the request to continue. I'm very mindful of the issues that Mr. Ammons is raising in his office.

THE DEFENDANT: May I speak?

THE COURT: Just a moment, please. The issues as I see them are Mr. Ammons waiting for, number one, medical records with regard to this victim's prescription for an anti-anxiety drug and his assumptions that she is abusing that, or his belief that she's abusing that and possibly not prescription drugs. The Court does not see how the medical records themselves would, in fact, assist him to a great degree in that, and if, in fact, the defense has known since October that the victim has been prescribed medications, there could have been a more diligent search for those records at that time. With regard to this Dr. Kenyon who treated the victim after the assault, if I can recall correctly from the weight of the

evidence hearing, there were pictures of injuries to the victim. The definition of bodily injury is a change in physical condition, no matter how slight, and can even

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[Tr. 28] include pain. I also recall testimony that the victim was in pain. So I don't see how this witness would be exculpatory for the Defendant. Even if the Defendant could find the witness, this Dr. Kenyon, it's not clear to me how she would at all be exculpatory to the Defendant.

With regard to the new witnesses that Mr. Ammons has learned about in the past week, I just don't have enough information that those people are relevant witnesses who know enough about this case; who are relevant enough about this case; whose testimony would be admissible in this case enough to continue the trial that has been already continued at one point. I think ample time was given in January to prepare the case. I'm mindful of Mr. Ammons' situation in his office. Mr. Brillion has been sitting in jail since July and we need to get this case heard, and with the issue of Judge Howard not being able to hear the case, substantial efforts have gone into this case being heard next week as far as the Family Court schedule; as far as the District Court schedule and with me rotating out, that would have to be done again with Judge Wesley. So for those reasons, we're going to deny the motion to continue.

MR. AMMONS: Mr. Brillion wanted to say something. Mr. Brillion, this is Rick. You and I can

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[Tr. 29] speak privately, and if you have other issues you want me to raise, we'll raise them before the Court that way. Okay?

THE DEFENDANT: Ms. Carroll, before you go anywhere -- What? She doesn't want to hear me or what?

COURT OFFICER: We're through now.

THE DEFENDANT: You're fired, Rick.

(The hearing concluded.)

* * *

[Tr. 30]

CERTIFICATE

I, Elizabeth Trotter, hereby certify that the foregoing pages, numbered 3 through 29 inclusive, are a true and accurate transcription to the best of my ability of the audio taped hearing in the matter of STATE OF VERMONT -v- MICHAEL BRILLION, held at the BENNINGTON DISTRICT COURT, on Friday, February 22, 2002, before the HONORABLE KAREN R. CARROLL, Presiding, to which a transcript was duly ordered.

_____

Elizabeth Trotter
Transcriber

STATE OF VERMONT
BENNINGTON COUNTY, SS.

BENNINGTON DISTRICT COURT

STATE OF VERMONT

-v- DOCKET NO. 957-7-01

MICHAEL BRILLION

- - - - - - - - - - - - -

PROCEEDINGS

HEARING: Motion to Withdraw

HELD: Monday, February 25, 2002

BEFORE: The Honorable Karen R. Carroll

APPEARANCES:

BRIAN K. MARTHAGE, ESQ., of the Bennington County State's Attorney's Office, 200 Veteran's Memorial Dr., Ste 10, Bennington, VT 05201-0172, on behalf of the State of Vermont;

RICHARD F. AMMONS, JR., ESQ., of the Bennington County Public Defender's Office,411 Gage St., Bennington, VT 05201, on behalf of the Defendant

COURT REPORTERS ASSOCIATES
117 Bank Street
Burlington, Vermont

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EXHIBITS

No. Description Page

(No exhibits.)

* * *

MONDAY, FEBRUARY 25, 2002

[Tr. 3] THE COURT: Okay. This is the matter of State versus Michael Brillion. Docket Number 957-7-01. Mr. Brillion, can you hear me?

THE DEFENDANT: Yes, I can.

THE COURT: Mr. Brillion is with us by video conferencing. Mr. Ammons, his attorney, is present; Mr. Marthage for the State, and we are here on the Defendant's Attorney's motion to withdraw which was filed today with trial to be beginning tomorrow, and we'll hear Mr. Ammons on that at this time.

MR. AMMONS: Thank you, your Honor. I really don't have much to say other than what's in the body of the text of the motion. I can simply tell the Court that I have been discharged by my client, and I have enumerated the reasons in the body of the motion.

Essentially, he has said to me that I'm fired which I guess we all heard on Friday, but it was said at the end of the hearing and I certainly made note of it, but I thought it would be wise to wait a day or at least some time and talk to Mr. Brillion after that hearing to get a clearer sense of the significance of the comment.

On the face of it, it's pretty clear but in the course of my conversation with Mr. Brillion, he made

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[Tr. 4] clear to me that he is unequivocal about his wish to have me withdraw from the case. He said that he was very unhappy with a variety of things about my work for him, and I have said to the Court in the motion and he made it very plain to me that I should get off the case. I told him that there were some risks to him with regard to that, and he said to me that it was clear that I should get off the case, and he told me to get off the case and I said I can't guarantee what -- you won't be able to select an attorney. You won't be able to decide who your lawyer is going to be. The Court will likely tell you that, and I'm not even sure the Court will take me off the case, and he said, I don't want you involved in my case at all at this point.

At which point I contacted -- I contacted my investigator, Steve Smith, and developed to the best of my ability the other information that your Honor and you all can see in the body of my motion. There is sort of a second issue there that I identified as the conflict that I had that goes to more the evidence,

presentation, and development of Mr. Brillion's self-defense and also our concerns about -- There were also the subject of Mr. Marthage's motion in limine that was put out today.

THE COURT: Which I haven't had a chance to read.

* * *

[Tr. 5] MR. AMMONS: Neither have I. I have skimmed it but, obviously, we are not here on that. In any event, I guess that's really all I have to say about it. I think -- I don't have my motion with me. I sort of got shuffled over here quickly to handle a couple of arraignment issues that -- Thank you, your Honor. I appreciate. That I called after I spoke with my investigator to get a little more information that I had merely alluded to in our prior motions to continue. We moved to continue in late January and also just last week on the grounds that I needed time to better develop the case. I called Steve Smith to try to follow up to some extent the information that we had, and before I put him to work and asked him to do anything, I said I'm not really sure what to do. I think I need to contact the Defender General. I called the Defender General at his home. He was playing basketball. He called me back hours later, late on the day Sunday, and we talked for a little while.

I shared with him our theory of the case as it was evolving and also the fact that I had been fired by my client, and he said to me that it was clear that I needed to move to withdraw. I made sure that he got

a copy of my motion before I filed it with the Court, and the reason I did that is I wanted to make sure that I had

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[Tr. 6] the benefit of my employer's oversight and make sure I wasn't just flying on my instincts. I mean, certainly when somebody says you're fired that's one thing, but I know that the rules are different with regard to appointed counsel. I know the rules that I cited here, 1.16 and 1.7, are relevant to the issues that I raised in my motion. I also know that Rule 6.2 is relevant with regard to assigned counsel. It doesn't give you a lot substantively more than the more substantive rules that I cited. In any event, your Honor, that's essentially it.

THE COURT: Let me ask you this just to be clear. Are you -- Other than the witness issue of possible conflict of potential witnesses, are you filing your motion to withdraw merely because Mr. Brillion fired you? Is that what it boils down to, or are you telling the Court at this time that you have such disagreement or you did mention disagreements?

MR. AMMONS: If I can answer the Court's question. I don't feel at the present time that I am able to continue my representation of Mr. Brillion. That's the basis for my filing the motion. The fact that Mr. Brillion fired me is certainly the triggering factor and that alone, as I have had clients say that in the past, and, you know, gone back and talked to me and it was just a matter of look, relax, let's talk about this;

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[Tr. 7] let's do that. In the course of my conversation with Mr. Brillion, it became very apparent to me that I am not able to go forward from my own point of view. And I think I alluded to it in the body of my motion, but, you know, I'm really not in a position to give factual --

THE COURT: No. But I mean based upon your hearing that he fired you, if he can do that (inaudible) and your conversation with him after the fact, after that was said, are you feeling that your ability to zealously represent him given these issues is now an issue for you?

MR. AMMONS: Absolutely.

THE COURT: Leaving aside the fact of not having time to prepare issue. I'm talking about the attorney-client relationship.

MR. AMMONS: No. The relationship has been severed, I think, is probably the right word. The other issues that are attended to it, the relationship has been strained, and I think I made some comment at one of the hearings we have had here and I didn't mean for it to sound gratuitous when I did it, when I said before the Court that I felt that I was able to communicate with my client, and I guess in some regards I think that's true and I hope it didn't sound self-congratulatory that I like my job and I feel that I can relate to my clients

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[Tr. 8] effectively. I believe they understand me when I talk, and I sometimes assume more than I should about the quality of the communication and the quality of the trust between myself and my client. I think in this instant matter, I think the quality of the relationship between myself and Mr. Brillion has been compromised significantly to the point that I cannot adequately represent him. Our relationship has suffered and beyond that, I'm reluctant to say more.

THE COURT: Okay. What does the State have to say?

MR. MARTHAGE: I think that we need some -- I think that the defense needs to show good cause for discharge at this late date. Particularly in light of the holding in State vs. Hicks which is 167 Vermont 623. Where the Court indicated -- our Supreme Court indicated last minute requests to substitute counsel are not favored absent unusual circumstances. And the circumstances that the Court should look to are, well, Defendant here is claiming a total breakdown of communication, apparently. That wasn't the case as of Friday. The total breakdown of communication relates to the presentation of the defense. Has it undermined the presentation of the defense to such a degree that no effective defense can be presented, and as of Friday that

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[Tr. 9] wasn't the case at all. Mr. Ammons was in here arguing the motion to continue and talked about how his relationship with his client had led him to the conclusion that a motion to continue was necessary. I

guess the State is --

THE COURT: Wait. Just one second.

MR. MARTHAGE: The reasons that the State sees in the motion presented by counsel are that the Defendant has a complaint about Mr. Ammons communicating with him on a regular basis; that the Defendant complains about Mr. Ammons' preparation for trial and that there are certain strategy differences between Defendant and Mr. Ammons. Strategy differences are not a reason for discharge of counsel. That point was addressed in United States vs. Goldberg. 667 F.3rd 1092. That came out of the 3rd Circuit in 1995 and was cited in Vermont vs. Hicks. Failure to prepare case for trial and failure to maintain communication. On Friday Mr. Ammons argued that the only failure to maintain communication was that it was difficult for him to speak with his client because he was up at the jail. Not that he couldn't but that it was difficult. The failure to prepare for trial is the same basis that the Defendant has been using to seek a continuance in this case twice previously, and mainly

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[Tr. 10] that they are quoting the motion recently learned of several witnesses who are critical to his defense. Those witnesses are undisclosed at this point in time. The motion presented before the Court said they will remain nameless. It is impossible for the Court to evaluate the efficacy of that representation without at least some disclosure, and if the Defendant had learned of those instances and thought they were

salient, why didn't they disclose them in the purposes of preparation for this trial to begin tomorrow. The rest of the Defendant's motion, your Honor, the State doesn't really feel goes to the merits of a motion to withdraw, but simply restates some of the points set forth in the motion to continue. So relying on the case law the State has cited and the (inaudible) of arguments set forth in counsel's motion to withdraw, the State would ask the Court to deny the motion. I would -- I do believe that just in terms of properly handling this, that the Court should make an inquiry of the Defendant.

THE COURT: I will do that.

MR. MARTHAGE: Thank you.

THE COURT: Mr. Brillion, can you hear me?

THE DEFENDANT: Yes, ma'am.

THE COURT: Okay. So you indicated your dissatisfaction with Mr. Ammons which, to tell you the

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[Tr. 11] truth, wouldn't get you very far because it's not your choice as to who represents you. You're entitled to competent counsel which Mr. Ammons certainly is and definitely competent counsel, so you have no choice to fire an attorney so the Court is not considering that in this ruling, but my question is to you: Do you understand that by requesting another attorney, your case with you being held without bail may be prolonged for four to six months we're talking

about at this time?

THE DEFENDANT: Yes.

THE COURT: Okay. And Mr. Ammons suggests in his motion to withdraw that an attorney be assigned, Mr. Harnett, who is now hired by the Public Defender's Office or the Defender General's Office to represent people facing sentences such as yours in serious felony cases; that he would have to have the time to get up to speed on the case. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: And so you would rather have a new attorney than go forward tomorrow with Mr. Ammons?

THE DEFENDANT: I don't see as we could go forward tomorrow anyways considering my Attorney hasn't spoken to one of my witnesses. We should have had a trial within the 90 days as I thought we were going to. I mean, seven months after an incident, there is no way

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[Tr. 12] any jury panel is going to hear the truth of anything on either side. I think my case has been compromised right from the beginning.

THE COURT: Well, that's another issue. I'm asking you. You're the one who indicated you wanted a new attorney. Are you willing to have the Court

grant Mr. Ammons motion and you wait for a new attorney to get fully familiar with your case, which, as I said, could take up to four to six months by the time the Court can get it back in here?

THE DEFENDANT: Yes. I'm prepared to sit here. I would rather do it right the first time. There is only one shot at it.

THE COURT: Okay.

THE DEFENDANT: So the answer is yes.

THE COURT: I'm not concerned with the witness situation because, in all frankness, I would strike those witnesses. There has been no prior notice of them. Even Mr. Ammons today hasn't told anybody their names. All deadlines have past to notify the State of witnesses, so I am not as concerned with the witness conflict issue, and I am not as concerned with Mr. Brillion's request to have new counsel because, as I said, if Mr. Ammons was here saying he should go forward, it's not Mr. Brillion's choice as to who represents him

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[Tr. 13] if that's assigned counsel as long as it's somebody who is competent which, as I said, Mr. Ammons certainly is. What bothers me at this point is that due to the recent events, and I can understand how these events have occurred since Friday, that Mr. Ammons is now saying he can not zealously represent Mr. Brillion, and that is what concerns the Court because the Court can't require an attorney to violate

his ethical obligations. As long as Mr. Brillion understands that he's going to wait for a new attorney to become familiar with his case, the Court is not going to extend deadlines that new witnesses be noticed; that new depositions be taken, et cetera. The Court is treating this as a substitution of counsel. Not as in any other way. But the Court feels uncomfortable, very uncomfortable, given this is a serious felony with a potential for a sentence of life in prison for Mr. Ammons to be required to represent Mr. Brillion when he feels he cannot zealously do that at this point. Not because of time constraints, but because of issues that the two of them now have between each other.

MR. MARTHAGE: May I speak, your Honor?

THE COURT: Yes.

MR. MARTHAGE: The State -- First of all, I haven't heard the Defendant indicate to the Court what

* * *

[Tr. 14] differences would give rise to a discharge of Mr. Ammons, and I think that's what the case law anticipates. Not that he understands that the substitute of counsel would result in a delay, but that he actually has reasons for requesting a discharge of counsel. I also haven't heard from Mr. Ammons what has changed since Friday which would give rise to the necessity for a discharge at this point in time, and the State's sense is in light of the case law, that absent extenuating circumstances which don't appear to exist here, discharge isn't appropriate.

THE COURT: Well, okay. My take on it was in order not to prejudice his client further, the two of them had considerations after our meeting here on Friday that leads Mr. Ammons to believe he can't effectively represent his client without -- by having him go into the detail of that, I think that those conversations could prejudice the Court as far as statements that may have been made by Mr. Brillion to Mr. Ammons, but Mr. Ammons can speak to that.

MR. AMMONS: That's essentially it, and I don't know that something has to change from one day to the next or one hearing to the next. You know, I don't know that I need to raise every issue that is on the table in my mind as I am attempting to go forward in good faith. Every time I have an opportunity to raise it and

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[Tr. 15] as things change, as things develop, sometimes you need to raise them and sometimes you need to not raise them, and I can't explain, you know, I can't answer every question for Mr. Marthage. I'm frustrated myself but --

MR. MARTHAGE: Your Honor, if I might. I would point out to the Court, this is the same tactic Mr. Brillion employed when he was up for trial on a habitual offender violation of an abuse prevention order. The State feels that effectively the same arguments were raised, and when they were addressed, they were addressed in the context of what has evolved between a fixed date and today. I guess the State's sense is that given the case law, and I

again refer the Court to State vs. Hicks that discharges clearly --

THE COURT: Okay. I hope you understand what I'm saying. If Mr. Brillion came in and requested that Mr. Ammons be discharged for X, Y and Z reasons, the answer would be no; but now I have an attorney telling me that due to his relationship with his client and conversations that he had over representation, whether the majority of those occurred within the last three days or not, he can not zealously represent this person in court. It's very often that a Defendant comes in and seeks to discharge a client, an attorney, and the attorney feels he can still zealously represent his

* * *

[Tr. 16] client. That's a different situation, but when you have Mr. Ammons here saying he cannot zealously represent him, I don't believe in good faith I can go forward with a case where someone is facing a habitual offender sentence, requiring that attorney to represent him. I will say that, without saying it, there is this underlying argument that the State has always made about this judge shopping issue.

I would support, if it was filed, a motion to have me specially assigned to the case because of the fact that I feel I have been involved with this case from the beginning. I know the history of the case. I have made legal rulings on the case, so Mr. Brillion asking for a delay in his trial is not going to necessarily get him a new judge.

MR. MARTHAGE: Isn't the defense required to make some showing or some representation about the reasons for its failure to being able to zealously represent a person? I mean, some showing besides the simple prima facie statement that I can't zealously represent this person anymore.

THE COURT: Well, as I understood it, it was a breakdown in the attorney-client relationship; and as I've said, the Defendant's attorney making statements as to specifically why the relationship has broken down

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[Tr. 17] may prejudice the Court if, in fact, this is the same judge that will be sitting on the trial. So I wouldn't grant Mr. Brillion's motion for a new attorney, but I'll grant Mr. Ammons motion to withdraw and we will appoint Mr. Harnett to the case. No new discovery deadlines are being issued. There will be a status conference in 30 days, and we'll see if Mr. Harnett is up to speed at that time.

THE DEFENDANT: Ms. Carroll, can I speak before we close?

THE COURT: Yes.

THE DEFENDANT: As far as discovery, my lawyer just recently started speaking to some of my witnesses in my case. Is this ruling going to affect me being able to bring witnesses forward?

THE COURT: That would be up to your new

attorney to speak to the Court through motions as to whether discovery deadlines can be extended or not, and that will be up to the Court to decide at that time.

THE DEFENDANT: Okay. Rick, give me a call if you can.

(The hearing concluded.)

* * *

[Tr. 18]

CERTIFICATE

I, Elizabeth Trotter, hereby certify that the foregoing pages, 3 through 19 inclusive, are a true and accurate transcription to the best of my ability of the video taped hearing held in the matter of STATE OF VERMONT -v- MICHAEL BRILLION, held on Monday February 25, 2002, at the Bennington District Court, before the HONORABLE KAREN R. CARROLL, Presiding, to which a transcript was duly ordered.

_____

Elizabeth Trotter
Transcriber

STATE OF VERMONT
BENNINGTON COUNTY, SS.

BENNINGTON DISTRICT COURT

STATE OF VERMONT

-v- DOCKET NO. 957-7-01

MICHAEL BRILLION

- - - - - - - - - - - - - -

PROCEEDINGS

HEARING: Motion to Withdraw

HELD: Tuesday, June 11, 2002

BEFORE: The Honorable John P. Wesley, Presiding

APPEARANCES:

BRIAN K. MARTHAGE, ESQ., of the Bennington County State's Attorney's Office, 200 Veteran's Memorial Dr., Ste 10, Bennington, VT 05201-0172, on behalf of the State of Vermont;

GERARD J. ALTIERI, ESQ., 407 Main St., Bennington, VT 05201, on behalf of the Defendant.

COURT REPORTERS ASSOCIATES
117 Bank Street
Burlington, Vermont

[Excerpt of Transcript, Pages 3 through 32]

* * *

TUESDAY, JUNE 11, 2002

[Tr. 3] OPEN COURT

THE COURT: State versus Michael Brillion.

MR. MARTHAGE: Your Honor, the State doesn't have a copy of the motion that was filed in this matter so -- State (inaudible) notice today.

MR. ALTIERI: That's two of us, your Honor.

THE COURT: I had an entry to schedule this for hearing that I issued on 5-21-02. That didn't go out?

MR. MARTHAGE: The notice that we have, your Honor, is dated from the Clerk's Office it's dated the 3rd of June, but, excuse me, it's file stamped by our office on the 7th which would have been last Friday, I believe.

THE COURT: Good afternoon, Mr. Brillion.

THE DEFENDANT: Good afternoon, sir.

THE COURT: The matter before the Court is State versus Michael Brillion, Docket 957-7-01. Mr. Brillion filed a motion to dismiss assigned counsel on

May 20 and I reviewed that on May 21 because Judge Howard has a conflict and indicated that it ought to be set for hearing. I think it was notified today that it was on

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[Tr. 4] for hearing calendar today. Mr. Brillion, I leave it to you. If you're more comfortable addressing the Court remaining seated, that's all right with the Court; but if you prefer to stand, that's all right with the Court, too.

Mr. Brillion, I'm going to address Mr. Altieri first because there was some suggestion that through some oversight the attorneys involved in the case have not have an opportunity to review your moving papers. Did I understand that correctly?

MR. ALTIERI: You did understand it partially correctly. Mr. Brillion was courteous enough to mail me a copy of it when I was out of the country during the week of May 18 to the 25th, and I had a chance to review it when I got back and I got the same notice as the State to be here, and if I didn't look at the Internet thing, I wouldn't have known to be here but I'm here. I was in District Court all morning so it's really a moot point.

THE COURT: So you have --

MR. ALTIERI: I have read the motion.

THE COURT: And since, Mr. Altieri, you got

Mr. Brillion's motion, have you had an opportunity to review it with him?

MR. ALTIERI: Not with him. I think it's

* * *

[Tr. 5] pretty self-explanatory. At least on its face. Michael and I go back a lot of years. I have done cases with him and I can address some of this. He may have a valid complaint. I haven't gotten him all the depositions he wants. And I have to go through them but I can assure you I have read them and, believe me, they are not worth from what we talked about. But when he says we haven't had an attorney-client relationship, I would point out since March. I think I was assigned this case in late March. I have been up to the jail twice to meet with you for almost two hours, and that's a record for me going up there and sitting down and talking so a lot of this stuff, you know. Michael has his issues. I thought we had this case worked out how we were going to try it and we reached an agreement on how we would present the case, and I expressed that to Michael what the shortcomings were. What I thought the strengths of that were, and apparently the history is that if I don't take all these depositions of these people -- Like he says in his moving papers, it's a simple case. And it very well may be, and I think a lot of the things he's asking me to do and to put this case --

THE COURT: Before we get there, let me ask Mr. Brillion then to elaborate a little more on -- Mr. Brillion, your moving papers have quite an impressive

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[Tr. 6] recitation of legal authorities and 'course the legal authorities that you cite, I want to be clear about a couple of things about that. None of the legal authorities that you cite, nor am I aware of any in Vermont or at the United States Supreme Court level that guarantee the right to choose the person who is assigned to represent you. So that has to be well understood from the outset. However, as you point out where a defendant who has had counsel assigned raises concerns regarding pretrial concerns regarding the effectiveness of the attorney-client relationship, the Court does owe it to the defendant and to the administration of justice to convene a hearing and to make some additional inquiry. So we're going to -- I'll hear you now with respect to the issues you think require the Court to at this point discharge Mr. Altieri and appoint substitute counsel, and I'm going to give Mr. Altieri a chance to respond once I hear more specifically.

THE DEFENDANT: First of all, this is a life penalty case, as you know. Secondly, Mr. Altieri, I don't know how you figure you spoke to me for two hours.

THE COURT: Actually, Mr. Brillion, I'll make sure Mr. Altieri doesn't do that either. At this point just address the Court.

THE DEFENDANT: From 9:40 to 10 o'clock he

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[Tr. 7] spoke to me one time, and one time we spoke in the hall and it must have been ten guys lined up to see him. My issue and I have known from the beginning. I have been in jail for almost a year. I've got letters here directed towards the judge about waiving my 60-day rule. I want to be brought to trial. I want to be brought to trial. Ten months into it, my other attorney, Mr. Ammons, finally got around to speaking to some of my witnesses and he, at that point, realized that there was conflicts. I have been in jail for almost a year with no bail. Took him eight months to get me in this courtroom. You know, for an evidentiary hearing on my bail that he never prepared for. I didn't even know I was going that day. They woke me up and dragged me down there.

THE COURT: Okay. Mr. Ammons. We're done with Mr. Ammons, so let's focus on Mr. Altieri.

THE DEFENDANT: I'm trying to be brief. During that period of time, I'm like, I thought it was some, you know, some type of government conspiracy so I'm writing to Doug Sears and the Defender General and they sent me to indigent (inaudible) thing with a lot of information as far as case law and stuff, and I found out that some of the public defenders, they are handling twice the national average for cases. So I started looking through this and the assigned attorney programs

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[Tr. 8] and this and that and the next thing, and I understand everything is overwhelming for the Judge.

I mean, I'm watching people come in here by the bus load. I'm facing a life sentence for a misdemeanor with double and triple enhancements, you know. I think this case deserves a little bit more than just a cursory look at it. I got a list of witnesses and how many witnesses have you tried. I mean, it's been a year and I'm not blaming assigned counsel because I know they got hundreds of cases, but I'm not going to go to trial with inadequate counsel. That's my life. I'm almost 40-years-old, and I'm not just going to get it up for nothing, and on top of everything, Mr. Altieri didn't do --

THE COURT: Mr. Brillion, I need you to focus quite precisely now. So far what you told me is some generalized concerns about how long you have --

THE DEFENDANT: Okay. I can go into case law.

THE COURT: Excuse me. Mr. Brillion, when I'm talking, it's my turn to talk. I'm going to give you a chance to respond, but I want you to hear what I want you to respond to. Okay?

THE DEFENDANT: Okay.

THE COURT: I have heard so far that you have some generalized concerns, legitimate it sounds to

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[Tr. 9] me, about having been incarcerated. Not waived your right to a trial. Having had a trial scheduled as,

I understand it, only to have a motion to withdraw filed at the brink of trial which resulted in Mr. Altieri being appointed. So what I need now, though, to hear, especially since as you acknowledge in your own moving papers to appoint substitute counsel at this point is inevitably -- whether you formally waive the 60-day period or not, it's inevitably going to result in additional delays, so I need you to be quite specific about your belief that Mr. Altieri has not performed in a diligent and professional manner in keeping this case for trial at this point. What do you claim he has not done that he should have done?

THE DEFENDANT: Discovery. He hasn't spoken to any of my witnesses. He refuses to give me discovery that's already been completed.

THE COURT: Be specific about that.

THE DEFENDANT: Some people have been already deposed and it's been transcribed and sitting in his office. You know, like Roger Phillips, the booking officer at the jail, you know. Dorothy Powers. There is a number of things. Hospital personnel. You know, I can make this simple, your Honor. We can sit here all day and I can sit here and cite case law, but I'm fumbling

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[Tr. 10] over my words. You know, we have Leonard (inaudible) versus Supreme Court of Louisiana. We can look at where indigents were afforded less than effective assistance of counsel due to heavy case load.

We all know that's ineffective right from the beginning. We can skip all that. Mr. Altieri is representing a witness against me.

THE COURT: Who?

THE DEFENDANT: Joe Rodreg.

MR. ALTIERI: Not in this case he's not listed.

THE DEFENDANT: Doesn't matter. From what I read, unless I'm misunderstanding something but I know one thing. I hardly think he's spoken to me for 20 minutes on that case on top of what Ammons already did, and I'm not going to trial with somebody I can't trust.

THE COURT: Mr. Altieri said that he had been up to the correctional facility and visited you twice.

THE DEFENDANT: Twenty minutes one time and maybe ten minutes another, and by the time we even -- it was logged in it and I made sure it was.

THE COURT: Mr. Brillion. Mr. Brillion. Direct your comments to the Court, please.

THE DEFENDANT: We didn't go into witnesses. We didn't go into trial strategy. He

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[Tr. 11] insisted that he was going to go through my list of witnesses. I have my list of witnesses. He hasn't

spoken to any of them. He hasn't given me my trial discovery. He's representing a witness against me.

THE COURT: Mr. Altieri, I thought from his question about that that he said that he asked you whether or not it was in this case. Is the person that you think he's representing listed as a witness?

THE DEFENDANT: In another pending case.

THE COURT: But not -- he doesn't represent you in that other case. Mr. Altieri doesn't represent you in that other case, right?

THE DEFENDANT: I'm not sure.

MR. ALTIERI: I can clarify that, your Honor. I represent Michael in two cases obstruction of justice case. I believe George Stanley is a witness in that who was driving the car. I represent Joe Rodreg, if I'm saying his name correctly, who is married to your ex-wife.

THE DEFENDANT: He's a witness against me.

MR. ALTIERI: Not in this case. He is not on the witness list. He is not listed. Am I mistaken, Brian?

MR. MARTHAGE: Your Honor, Mr. Rodreg is a witness in a felony VAPO where Mr. Brillion is a

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[Tr. 12] defendant which is also a life case. Mr.

Brillion's attorney in that matter is Gwen Harris.

MR. ALTIERI: So I don't think there is a conflict with the witnesses, your Honor. I'm not going to quibble about signing at the jail. They don't log who --

THE DEFENDANT: They do and I asked --

MR. ALTIERI: Michael.

THE COURT: Mr. Brillion?

THE DEFENDANT: Yes, sir.

THE COURT: I shouldn't have to explain this but I'm going to because the next time I have to do this, I'm going to hold you in contempt. Okay? So I'm going to come back to you. I'm going to allow you to make any response that you want once Mr. Altieri has made his response. This is a court proceeding and you're not allowed to simply interrupt whenever you disagree. Mr. Altieri, go ahead.

MR. ALTIERI: Your Honor, just for the record, I represented I had been up to the jail twice. I met with you twice. Once during --

THE COURT: Mr. Altieri, don't do the same thing. You're talking to me now.

MR. ALTIERI: Yes, your Honor.

THE COURT: You should know better than to personalize this any more than it needs to be.

* * *

[Tr. 13] MR. ALTIERI: I'm sorry. I was up at the jail twice during the Sartoni trial. I did meet with Mr. Brillion at length and we did discuss trial strategy. For the sake of not tipping my hand to the State, I'm not going to go into that. I thought I made that very clear as to how we were going to go. I'll just address the specific issues and I'll represent -- You know, my policy. I'm not going to -- I'm not filing the motion.

THE COURT: I want you to represent specific issues that Mr. Brillion has raised.

MR. ALTIERI: Okay. No --

THE COURT: Be quiet.

MR. ALTIERI: Yes, sir.

THE COURT: I'm having a hard time here making myself understood to both people on this side. When I'm talking, you don't get to interrupt.

MR. ALTIERI: Understood.

THE COURT: You've addressed the issue about going to the correctional facility. The other two issues that Mr. Brillion has raised are issues with respect to (inaudible) request to have copies of discovery, and his suggestion that he has provided you with a list of potential witnesses and he claims that you haven't interviewed any of the witnesses or followed up.

MR. ALTIERI: First as to the discovery

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[Tr. 14] issue, I did discuss that Dot Powers is simply the neighbor there. She is the parent educator at SRS. She doesn't have flattering things to say. You want a copy of the depo? I'll get it up to you.

THE COURT: Mr. Altieri, if you do it one more time, I'm going to hold you in contempt.

MR. ALTIERI: Okay.

THE COURT: You address, you address your remarks to me, and when you're addressing your remarks to me, you can refer to your client as my client or you can refer to him as Mr. Brillion but you don't say you.

MR. ALTIERI: All right. Fair enough, your Honor. I will get Mr. Brillion copies of the depos that he wants. With respect to Mr. Phillips, he's the correctional officer who is up there who apparently witnesses a mark to his back and the problems I have with using Mr. Phillips is that it brings him to the fact that he, Mr. Brillion, is incarcerated and I don't want the jury to see that. His other issues are that we don't have an attorney-client relationship. I disagree with that. I have met with the man. He's given me a list of witnesses. They are not really -- Mr. Ammons has done depositions here. Twelve, plus a full evidentiary hearing. I think what Mr. Brillion wants is for me to somehow bring in a lot of people. I understand what this

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[Tr. 15] case is. It's an assault involving, I think, no real witnesses. Just he and his wife, and to bring in all of these other witnesses, some of them young kids and relatives who saw nothing in an attempt by Mr. Brillion -- this is his theory -- I don't want to use the words trash, but impeach Mrs. Tatro. I'm not sure that stuff is admissible. I'm not so sure I want to do that in front of a jury. I have a plan. I talked to Mr. Brillion about it at length that I think may work in this case. No guarantees. I think it's workable based on the facts and he can provide the evidence to that.

As far as me not filing motions, I have put a notice of self-defense in which was not done which is essential for this case and I will look at the habituals if they can be attacked. I represented you, Mr. Brillion, on one of those sexual assault trials. I don't know if I can sustain a frontal attack on the habitual. I have tried that many times and failed. I have tried habitual cases. I know he's worried about that. He is facing a multiple life sentences. I think there are habituals attached to the other pending charges. I am not a stranger to trying these kinds of cases, and Mr. Brillion has written to Mr. Sears and I don't want to -- I'll just quote previously. "Mr. Altieri notorious for being unprepared." I'll state for

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[Tr. 16] the record, I have tried 12 cases with Mr. Lavoie who I think is the best trial attorney as far as a prosecutor in this County and the State and I have

won 66 percent and you don't do that being unprepared. And you have seen me try complex cases before, and I'm willing to work with the man, but I cannot do a lot of things he wants me to do, and I am not the first attorney he's fired. And Mr. Ammons, just to go into the history, got up there and said point blank I can't render effective assistance of counsel. I saw no conflict with the witnesses. I get the case in late March and Mr. Brillion is concerned that somebody waived the 60-day rule. That wasn't me. I haven't had this case a year and I'll go through and if I think I can use these witnesses, if they have something material to say to the facts that night, I'll use them. But if Mr. Brillion wants me to go on a fishing expedition and haul in people and relatives just to trash his wife, I don't think a Judge is going to allow me to do that. At least not in front of the cases I've tried downstairs, and if it's not relevant, I think it could hurt the case potentially in front of a jury.

I'll represent to the Court I met with him. I sat with him. Not in a line with 12 people. In a room by ourselves, and I gave him a lot of my time and the case, frankly, from what I have been told as far as

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[Tr. 17] the procedural posture, I was led to believe it was going to be tried in front of you some time this summer. Then I was told Judge Suntag was coming over to do it in the fall, so it's not exactly like it's coming up next week. There are some months ahead of us. I haven't had the case that long and I think we do have a vital trial strategy, so the motions in an assault

case. There are very few motions to file except to keep out your priors, and I can do that in a motion in limine. I know the State, Mr. Marthage, has given notice of every conceivable conviction he's had or a bad act and I have seven days for trial to do that, and this thing is not coming up on the trial radar until September at the least, so I don't see that there is any merit to that argument. I may be wrong but I understood --

THE COURT: I'm not sure about that.

MR. ALTIERI: I understood that -- My information was that it's not coming up until September, your Honor, and I just got hit with another 60 dayer today, and I'm sorry that his 60-day thing was waived. I certainly had nothing to do with that. I never waive 60 days unless I'm explicitly told to do that.

THE DEFENDANT: May I speak?

THE COURT: You may.

THE DEFENDANT: May I give you copies of

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[Tr. 18] letters I gave to Mr. Altieri so you can see? And also just to show you how little Mr. Altieri knows about this case. It is not an assault against my wife. And as far as Roger Phillips who was the booking officer who struck me naked, I will be calling him for a witness to show self-defense where I was attacked

with a baseball bat and this woman turned right around and called the police to cover up the crime of what she did to me. I have already sat in jail for a year and I want a trial, and what my request to you is, sir, to appoint me an ad hoc attorney and monitor the case yourself. That's what I want, and I would like to give you copies of letters I have sent Mr. Altieri.

MR. ALTIERI: No objection.

THE COURT: Mr. Marthage?

MR. MARTHAGE: Your Honor, a couple of things I would like to clarify. First of all, this isn't a 60-day case. He's held under 7553. This is no rights trial in 60 days under 7553. It's a life imprisonment case. Second of all, your Honor, I think it's important to let the Court keep all of this in the context of Mr. Altieri assuming this case after Mr. Ammons was terminated. Mr. Ammons was terminated on the eve of trial. At that point in time it was made clear by the Judge on the record that any new counsel assigned would

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[Tr. 19] result in substantial delay. The Court had set it up, I think, for a 60-day status conference, and I don't recall what happened there but Mr. Altieri and I apparently had the same conversation with either the judge or the clerks downstairs that the backlog related to other cases and specifically other 60-day cases necessitated Mr. Brillion being put off because he brought up -- he was brought up to the eve of trial.

He had the trial dates reserved and he did not use them.

I would note also for the Court that in my experience prosecuting Mr. Brillion, he has fired Mr. Ammons on the eve of trial. He has also sought to fire Gwen Harris on the eve of trial for the very same reasons. He claims attorney-client breakdown, and I point to that not to show that it's not necessarily valid in this case but this is a regular course of conduct for Mr. Brillion, and the Court's right. He does not get to choose his counsel. I honestly have concerns about counsel being repeatedly appointed. The State has seen cases like that where a delay of years is involved because the defendant isn't happy with the facts. Not that he isn't happy with his counsel. Finally, with regards to the issue of discovery. Just looking at VRCP 16, your Honor, and specifically 16.2. Custody of materials. It's not clear that defense counsel has any

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[Tr. 20] obligation at all to turn over whatever the defendant requests to him. The rule states, "Any materials furnished to an attorney pursuant to these rules shall remain in his exclusive custody and be used only for the purposes of conducting his side of the case, and shall be subject to such other terms and conditions as the Court may provide."

There is nothing in the rule that demands that Mr. Altieri produce this material to Mr. Brillion, and the argument could certainly be made that it's Mr. Altieri's discretion that governs the handling of

discovery matters. So I just bring that to the Court's attention. I think the Court's well aware of what the standard is here and I won't belabor that point, but it's the State's sense that again this isn't coming to trial for some period of time. The Court did impose -- when Mr. Ammons was terminated, the Court indicated that no further discovery would be allowed absent extenuating circumstances. As Mr. Altieri indicated, there were a large number of depositions that were taken here. The witnesses the defense did disclose prior to February of 2002 were, in fact, deposed in a timely fashion, so that's all the State has to say.

MR. ALTIERI: Your Honor, if I briefly may respond to that and another issue has come up. With

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[Tr. 21] respect to discovery, despite 16.2, I generally don't withhold things that Michael wants. If Mr. Brillion wants to see these files I have no -- I'll get him what he wants. With the fact of no further discovery that's problematic because as I understand it, and I wasn't there, Mr. Ammons and I'm just -- came out and said I don't get the impression that this is a conflict case. This is a case of I can't render effective assistance of counsel for whatever reason, and if that's the case then to have me or the next attorney saddled with that is a violation of the Sixth Amendment. If I or the next attorney thinks that some of this stuff wasn't done right or there is (inaudible) under Strickland vs. Washington and that discovery should be open to that point or -- but I'll let that to the District Court Judge.

THE COURT: I think I'm going to be the District Court Judge in this case.

MR. ALTIERI: Perhaps. I just don't know for sure, your Honor. I'll take your word.

THE COURT: I'm at least the District Court Judge at the present time, and was there any other -- once you were appointed, Mr. Altieri, had there been any other discovery order?

MR. ALTIERI: I haven't seen an official discovery order or stipulation but maybe Mr. Marthage can

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[Tr. 22] address that.

THE COURT: Has there been a status conference?

MR. MARTHAGE: I don't recall when we had a status conference after this or not. I honestly don't recall, your Honor. I would note that it was my understanding at that conference with Mr. Ammons that in order to reopen discovery there would need to be a motion and some showing of cause.

THE COURT: Okay. Have a seat, Mr. Brillion. I am going to get to you.

MR. ALTIERI: One further issue. I asked Mr. Brillion during the break if he still wanted me to

represent him and I think I'll let him address that, but I think he emphatically said no and I understand that but I won't tolerate the threats to my life. I won't tolerate that. And maybe before you make those threats you should learn a little bit about my background, but this man could fill you in on --

THE DEFENDANT: Yeah, I know. You're all buddies. That's what concerns me.

THE COURT: Mr. Altieri.

MR. ALTIERI: I don't take threats to my life –

THE DEFENDANT: I didn't threaten you. I

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[Tr. 23] told you you did not need to work in collusion.

THE COURT: Mr. Brillion, I have been trying as hard as I can to conduct in a judicious fashion, and I will remind everyone in the courtroom now. You don't talk to one another. You talk to the Court.

MR. ALTIERI: As I was saying, I'll make the threat very specific and I'll use the foreign language to describe the expletive that was said. But it was, "If it takes 20 years to get even with you, I will get you." And I have heard these threats before from you, Michael, because I have represented you before, so at this stage I don't see how I want to stay on this case. Normally I would, but you start threatening my life, I take that very seriously.

THE DEFENDANT: I threatened your life, Gerry?

MR. ALTIERI: Yeah. You said you'd take 20 years --

THE COURT: That's enough.

MR. ALTIERI: I have said enough, your Honor.

THE COURT: Mr. Brillion, you're pushing the boundary about as far as they can be pushed. I just warned you for the second or third time, having warned you once before, that one more would be it. Now, you may

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[Tr. 24] address the Court, Mr. Brillion.

THE DEFENDANT: I tried to fire Mr. Ammons because he was never --

THE COURT: I'm not concerned with Mr. Ammons. I want you to focus on the issue with Mr. Altieri. Mr. Altieri has just indicated to you that you threatened him.

THE DEFENDANT: I didn't threaten his life.

THE COURT: Did you say, "If it takes me 20 years, I'll get you."?

THE DEFENDANT: That's not exactly what I

said, sir. May I show you the letters I have been sending? I tried and I've got letters from case workers where I have made, you know, dozens of phone calls to Mr. Altieri. He doesn't return phone calls. He doesn't do discovery. He doesn't get me discovery that's already been transcribed. I have just watched him lose four or five major felonies in a row. I have no faith in Mr. Altieri. On top of him trying to tell me that he's not going to call any of my witnesses but then not even tell me he's not gonna. May I give you the letters, sir?

THE COURT: You don't need to give me the letters, Mr. Brillion. I'm going to grant your motion. You said yourself, Mr. Brillion. As you said yourself,

* * *

[Tr. 25] Mr. Brillion, this is somewhat of a dubious victory in your case because it simply prolongs the time that you will remain in jail until we can bring this matter to trial; and as you yourself have also acknowledged, all of the Supreme Court authority in the world notwithstanding, I do not have the power nor does any Judge have the power to direct the Legislature to open the purse strings to provide for a full cadre of appointed counsel sufficient to provide -- even if this were required, and I want to make it clear to you that it's not required professionally but assuming that it was (inaudible) that I could find some professional obligation for an attorney to always return every phone call that his client made, to be at the client's instant beck and call to do every bit of copying that was required. To certify to the client that the attorney interviewed each and every witness that

the client said might have something relevant to say about the case, assuming that was a professional responsibility and it is not but even assuming that it was, I would be powerless to provide, to order the assignment of counsel sufficient to be able to do that. It just is not going to happen. So I will tell you that in this case but for the breakdown in communication that to some degree the two of you conspired to make occur right in front of the Court and

* * *

[Tr. 26] for which both of you got very close to issues of contempt, I would have denied the motion. I would have required Mr. Altieri to provide the discovery.

If he had I would have required Mr. Altieri to give some explanation about his strategy to you but I can't -- it's delusory, Mr. Brillion, for you to think that the presiding Judge in your case, whether it's me or whoever else it is, is going to take control of the case and monitor the relationship between you and your assigned counsel. That's not how the system works. But because it is clear to me that the attorney-client relationship has broken down irretrievably in this instance, I don't see that I have any other recourse but to assign you new counsel. I will be in contact with the District Court Clerk this afternoon to ask her to make a diligent search for counsel. I can't promise you at this point how long that will be because I know for a fact that our resources for ad hoc counsel are perilously thin. When you get new counsel, Mr. Brillion, you're going to be facing -- I'm going to warn you in advance because I have a feeling that we may be having this

discussion again. When you get new counsel, you are going to be facing to some extent the same situation.

I want to make something clear now so that we can be reminded if it comes up again. The Canons of

* * *

[Tr. 27] Ethics make it very clear and your right to fair trial and your right to counsel also do not include your right to manage every aspect of the strategy of the case. Indeed, it is your attorney's professional responsibility to do that and your attorney is free to ignore your suggestions as to trial strategy. Your attorney can't compel you with respect to a plea but much of the rest of how the trial is conducted is up to your attorney's discretion and that may include the discretion to decide which witnesses that you believe may have relevant information. The attorney simply does not need to contact, because if you look at the information, and that's what I was doing. The information here speaks about a fairly straightforward set of factual events, and so if there are eye witnesses certainly counsel has the responsibility to talk to them. But if you're talking about character witnesses or collateral witnesses or witnesses to try to impeach other than the testimony of other witnesses to events that happened, an attorney is not required to make those sorts of inquiry. And can legitimately and without violating the Canons of Ethics insist to a client that that's not going to happen.

The place where in circumstances like this, assuming that Mr. Marthage is correct, Mr. Brillion,

and is becoming something of a pattern and,

* * *

[Tr. 28] frankly, because I know Mr. Ammons' discharged. I don't know anything about (inaudible). I don't know anything about another pattern beyond that, so I'm not going to make any assumptions but I will tell you that there comes a point in proceedings that are somewhat like this where a defendant is confronted with a very difficult decision. If you can't find assigned counsel with whom you have the absolute utmost confidence, and it's possible that you won't, then -- and you reach the point where you insist on calling all of the tactical shots in the trial, you have the right to do that, but you don't have the right to have an attorney who will do that for you. So that then implicates your right to represent yourself. If you want to do that, and I suggest to you that we may be approaching that dilemma in your case, but I don't prejudge it. I only -- forewarned is forearmed. I hope we are not heading down that road, but we'll appoint substitute counsel and this Court will set a status conference within a very short time after substitute counsel is appointed so that we can attempt to address trial preparation issues at that point and get this case on track to be resolved sooner rather than later, and I am not at all sure that that will require pushing the case into the fall but I will have to address that with the Court Clerk.

* * *

[Tr. 29] THE DEFENDANT: Can I say one more

thing? I am a little familiar with assigned counsel as far as who is on the ladder and stuff because I do a lot of letter writing and stuff for inmates. Most of the people in jail that can't read or write. That's one thing I can do. I realize, I believe Mr. Paul Donaldson is next on the list, and I know he's going through the same dilemma as a lot of the other --

THE COURT: There is no one who is not going through that dilemma, Mr. Brillion. I am not going to be able to assign you somebody who will be able to devote the entirety of their practice to your case, and you will have preserved your right to argue as a matter of law if you can make out enough of a threshold that this, our courts state wide are violating your right to counsel by appointing people that are overworked but that, in the Court's view right now, that's a blunder bust approach, Mr. Brillion, that simply by saying everybody knows they are overworked does not make out a case. I presided in District Court all last term in Brattleboro and although the attorneys there have heavy case loads, I have not seen rampant exhibitions of misconduct by those attorneys. So it's not enough to say they are carrying twice the recommended case load. Even assuming that that were true, and I don't know that

* * *

[Tr. 30] it is. It would have to be established by evidence and we are not there yet.

THE DEFENDANT: Have you seen the indigent defense task force, your Honor?

THE COURT: No. I have concluded the proceedings. I granted your motion, Mr. Brillion. That's all that's required at this point. Thank you.

(The hearing concluded.)

* * *

[Tr. 31]

CERTIFICATE

I, Elizabeth Trotter, hereby certify that the foregoing pages, numbered 3 through 30 inclusive are a true and accurate transcription to the best of my ability of the audio taped hearing in the matter of STATE OF VERMONT -v- MICHAEL BRILLION, held at the Bennington District Court, on Tuesday, June 11, 2002, before the HONORABLE JOHN P. WESLEY, Presiding, to which a transcript was duly ordered.

_____

Elizabeth Trotter
Transcriber

STATE OF VERMONT
BENNINGTON COUNTY, SS.

DISTRICT COURT OF VERMONT
UNIT II, BENNINGTON COUNTY

STATE OF VERMONT	]
	]
V.	]
	]
MICHAEL BRILLON	]

AUDIO TAPED
HEARING OF 11/26/02
BEFORE JUDGE SUNTAG

BRIAN K. MARTHAGE, ESQ., DEPUTY STATE'S ATTORNEY, STATE OF VERMONT;

PAUL DONALDSON, ESQ., ATTORNEY FOR DEFENDANT

* * *

[Tr. 2] JUDGE SUNTAG: Uh, I've read – I've read Mr. Brillon's motion which he filed on his own. Mr. Donaldson, um, I note you didn't file anything for yourself. Is – you don't have anything to say about this?

PAUL DONALDSON: Judge, I – by way of explanation Judge, um, I've been going out of the private practice of criminal defense work. In fact, my contract with the Defender General's office had expired

in June, which was in Mr. Brillon's case, was (unintelligible) me basically the beginning of my departure from the contract. Um, I had been discussing with the Defender General's office in getting Mr. Brillon's case, among others, reassigned because of the nature of the case and just because it's, you know, the nature of the case. Um, I had been told by the Defender General's office that they were going to reassign this case. They were going to have new counsel assigned that was more able and more equipped to deal with the case. Um, Mr. Brillon just showed me a letter from the Defender General's office stating that that was going to happen.

JUDGE SUNTAG: What's the date of the letter?

(UNINTELLIGIBLE)

PAUL DONALDSON: I think it was October twenty-something.

JUDGE SUNTAG: October 21?

PAUL DONALDSON: May I approach?

JUDGE SUNTAG: Yeah.

JUDGE SUNTAG: I mean, if I'm reading this right then, for whatever reason, they are waiting for the court to deal with the motion and then if granted they will assign it to –

BRIAN MARTHAGE: Loevy-Reyes.

JUDGE SUNTAG: Loevy-Reyes? I mean is that how you read this?

* * *

[Tr. 3] PAUL DONALDSON: That's how I read it, yeah.

JUDGE SUNTAG: And that's what they're waiting for?

BRIAN MARTHAGE: Your Honor, I would note for the Court's information that, uh, Ms. Loevy-Reyes is I think somewhere along the line of 7 or 8 months pregnant and I'm not sure what kind of time she anticipates taking out. She had already conveyed to me that she will be missing some time as a result of her pregnancy and I indicated that I would be willing to grant continuances. This case has been ongoing for quite a while. The defendant has been incarcerated for a very long period of time and he deserves a trial. There is no doubt about that.

JUDGE SUNTAG: I know. But I don't, and if what I'm hearing from Mr. Donaldson is that he's not going to be representing him anyway. I mean, it's not even a question of whether or not he's going to be dismissed from the case. If he doesn't have the contract anymore it's supposed to be reassigned in the first place anyway.

PAUL DONALDSON: My discussion with the Defender General's office have been for quite some time since the contracts were up were can I get some

of these cases – some case relief on some of these cases and his case is one of these cases that – that, uh, we had discussed getting some relief on, I mean, because of the seriousness of the case.

JUDGE SUNTAG: But you can't continue with this case in any event? I mean, unless it's ad hoc (unintelligible).

PAUL DONALDSON: I don't feel that, uh – I don't feel that it's, uh, fair to Mr. Brillon, um, because of constraints any my other responsibilities to continue with the case. I don't – I don't think it's uh – it would be fair to him.

* * *

[Tr. 4] BRIAN MARTHAGE: Your Honor, by way of explanation to the extent that the State has any say in this I can give you seasonal history, which was this case was ready for trial. Mr. Ammons was allowed to withdraw the day before, uh –

JUDGE SUNTAG: The day before jury draw?

BRIAN MARTHAGE: The day before trial. It was the day before trial. It was a pick and go so it was the day before trial. Uh, and at that point in time Mr. Altieri was assigned to the case. Mr. Altieri subsequently got out. Uh, all discovery had been complete, um, before Mr. Donaldson even got in so he was in in May?

PAUL DONALDSON: End of May.

BRIAN MARTHAGE: And, uh, we had one conference on this with Judge Wesley, uh and then Mr. Donaldson's contract terminated so, to the – I mean, I don't think – I would agree with Mr. Donaldson that Mr. Brillon isn't going to be substantially disadvantaged because he is withdrawing because Mr. Donaldson hasn't been with the case all along. On the other hand, uh, you know, it has been a substantial period of time and Mr. Brillon has still been incarcerated and no movement on the case has gone forward.

JUDGE SUNTAG: Mr. Brillon, what would you like me to do today (unintelligible).

MR. BRILLON: I want to go to trial within 60 days, that's what my understanding was. Mr. Ammons (unintelligible) three or four depositions and found out when he got my list of witnesses that he was representing for – had represented some of them before that. He withdraw a day or two days before jury trial. I got Mr. Altieri. Mr. Altieri did absolutely nothing. He never did – finished the discovery, refused my phone calls, letters, the whole thing. He withdraw or I fired him, whatever is on record, I'm not sure. Then I get Mr. Donaldson. I spoke to him two minutes before court several months ago and he hasn't returned my phone calls. I mean it's

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[Tr. 5] one right after the other. If we had a trial tomorrow morning it wouldn't be fair to me and it wouldn't be fair to the State. And it's not my fault.

I've been in for eighteen months – seventeen, eighteen months and I thought – I've got copies of every single letter I've sent to the judge, please bring me to trial. Please tell my lawyer to talk to me. Now they're shipping me from one end of the state to the other. He didn't even know where I was. You know, I don't – I want a lawyer that will work with me. Bring me to trial. Even if we have a trial it's not going to be fair. I mean, you got a double enhancement on a misdemeanor (unintelligible) it's a life sentence. Come on.

JUDGE SUNTAG: That's just a different issue for us.

MR. BRILLON: I know it's a totally different issue.

JUDGE SUNTAG: Um, let's just be clear – you don't want to represent yourself, right?

MR. BRILLON: I'm not qualified to do that. I can do simple motions and I can read law but there is no way I can go up against this guy. He's gone to school, you know? I might as well go in and plead guilty.

JUDGE SUNTAG: And you do not want to have Mr. Donaldson based on everything? (Unintelligible.)

MR. BRILLON: Exactly.

JUDGE SUNTAG: You do want me to get you another lawyer?

MR. BRILLON: That's right. An effective lawyer. You know, I mean – I don't know what to tell you. I know I can't pick my own.

JUDGE SUNTAG: Right.

MR. BRILLON: And I understand that because I'm under the assigned counsel program because I can't – I do not have the money to represent myself. But if you're going to start

* * *

[Tr. 6] throwing Altieri, Donaldson, (unintelligible), people like that, I mean, I'm going to have – I'm going to have the same thing I've got now.

JUDGE SUNTAG: Well again, I don't know what to tell you about that except those are people who have contracts so those are the first ones that they go to.

MR. BRILLON: I've heard Ms. Loevy-Reyes is going to conflict out on me anyways.

JUDGE SUNTAG: Well, we'll find out real quick. Um, this is what I'll do. Mr. Donaldson is going to be out obviously for all reasons, including yours. I'll release him from the case, contact the Defender General's office and tell him immediately assign whoever it is you're going to assign, uh, to the case you know and have that person determine immediately whether or not she or he can do it and whether there's a conflict. And if not tell me and we'll get somebody

else assigned and we'll just work it as quickly as we can and we'll get you counsel.

MR. BRILLON: Isn't there a conflict database when you – when you're first assigned to a case? That's my understanding.

JUDGE SUNTAG: The truth be whether there really is or not...

MR. BRILLON: Isn't that – I mean, is that something I'm just hearing or is that something that I...

JUDGE SUNTAG: Actually Mr. Donaldson would probably know better than I would.

MR. BRILLON: ...is there a conflict in a case.

PAUL DONALDSON: I can tell – I think it's at my office – I have provided a list of the witnesses in his case (unintelligible).

JUDGE SUNTAG: Do you have that – I guess what I'm going to ask you to do is this. Can you send that list directly to the Defender General's office and Ms. Loevy-Reyes...

BRIAN MARTHAGE: Loevy-Reyes.

* * *

[Tr. 7] JUDGE SUNTAG: Loevy-Reyes directly and we – you know, just send it off and we'll contact both and

say if it's going to be reassigned right away (unintelligible) I expect to hear you know within a week or two what they're doing.

MR. BRILLON: The superintendent in Newport called Ms. Loevy-Reyes office and she said there was a conflict with one of my witnesses and that they had put a motion into the court that they put it in. Brian, do you know anything about that?

BRIAN MARTHAGE: Your Honor, I would just represent that Ms. Loevy-Reyes – my understanding is that she just came to the area. And she just picked up conflict cases and so to the extent there is a conflict it would probably be with a current client and not a past client.

JUDGE SUNTAG: Yeah. Well, let's – I mean, let's just find out. Okay. So, what we'll do today as far as the motion to dismiss it's granted to counsel.

PAUL DONALDSON: Thank you.

JUDGE SUNTAG: We will, uh, notify the Defender General to reassign immediately and I want a report within two weeks at the outside whether reassigned counsel has any conflict.

MR. BRILLON: Thank you.

JUDGE SUNTAG: And then we'll go from there.

BRIAN MARTHAGE: Your Honor, the State would also request a status in thirty days. Our

concern is that even if counsel gets assigned that somehow the case is going to fall through the cracks.

JUDGE SUNTAG: I don't have any (unintelligible). We had actually figured out – we're already working on how we're going to get the case tried, which judge could do it and when.

BRIAN MARTHAGE: Okay.

JUDGE SUNTAG: That's now changed too. But, let's push along.

* * *

[Tr. 8] MR. BRILLON: Thank God.

JUDGE SUNTAG: As soon as I know we'll come back and have a status. Once we know the attorney, we'll have a status.

BRIAN MARTHAGE: Thank you Your Honor.

* * * * * * * * * * * * * * * *

[Tr. 9]

CERTIFICATE

I, Kathy L. Carrier, a private contractor for the State of Vermont, of Bennington, Vermont, and Notary Public, do hereby certify that the foregoing pages, numbered 1 through 9, inclusive, are a true and accurate transcription of the hearing of November 26, 2002, for the use in the matter of State v. Michael

Brillon.

Kathy L. Carrier
Notary Public
My Commission Expires:
2/10/07

STATE OF VERMONT
BENNINGTON COUNTY, SS.

Bennington District Court
Docket No. 957-7-01 Bncr
Status Conference
Audio Taped Recording

STATE OF VERMONT)
)
vs.)
)
MICHAEL BRILLON)
Defendant.)

Held on January 8, 2003
Before the Honorable Karen R. Carroll

APPEARANCES:

Attorney Marthage, Representing the State of Vermont
Michael Brillon, Defendant (Appearing Without Counsel)
Attorney Sleigh - (Via Telephone)

* * *

[Tr. 2] (January 8, 2003)

(TAPE #1)

THE COURT: Mr. Sleigh?

MR. SLEIGH: Yes.

THE COURT: Okay.

We're on the record now in State vs. Michael Brillon. He's present. Mr. Marthage is present. This is Judge Carroll. And we're scheduled for a status conference in various dockets of Mr. Brillon's.

We -- I'm not exactly sure of the history of Mr. Sleigh's appointment or non-appointment to the case because I'm just sitting in today, but he is not present and has his reasons for that, that we would ask him to just explain to us so we can determine where we're going to go from this date. So, Mr. Sleigh, what do you have to say about your appointment or lack thereof at this time?

MR. SLEIGH: All right. As far as I'm concerned, at this point I'm just another lawyer in Vermont. I have a contract with the Defender General to provide representation in certain cases that meet various contractual criteria. I was informed on December the 2nd that I might get assigned in these cases, and I was informed by way of e-mail from Lora Evans. Ms. Evans says to me once I have reviewed the Court's paperwork, I'm to

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[Tr. 3] let her know if I have any conflict of interest that would ethically prohibit me from becoming involved in these cases. I've received no such

paperwork as yet to review. I was --

THE COURT: Was that -- I don't mean to interrupt you, but was that to come from her or from the Court?

MR. SLEIGH: I have no idea.

THE COURT: Okay.

MR. SLEIGH: I was told in the same e-mail that the regular frontline public defenders had conflicted out of the case due to so-called irreconcilable differences which I understood was a grounds for divorce, but not necessarily for disqualification of an attorney, but that nevertheless that they've conflicted out, and that subsequently three assigned lawyers had represented Mr. Brillon in these cases; Mr. Altieri, Ms. Harris and Mr. Donaldson. Though I haven't been told as to whether any of those three conflicted out because they had a conflict of interest.

Assuming that I receive a notice to assign counsel assigning me to this case, which I have yet to receive from the Court, and assuming that I have no conflict of interest that would ethically prohibit me from taking the case, I would then look to see whether there

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[Tr. 4] was a conflict of interest because my contract only obliges me to appear in cases where there has been a disqualifying conflict of interest by predecessor

counsel. I'm not contracted to be the über assigned counsel for cases that have presented difficulties other than a recognized and -- and judicially found disqualifying conflict of interest.

So, just to summarize, I've never received a notice to assign counsel from the Court indicating I've been assigned. I've never received a DDR. I've never seen any findings of conflict regarding Misters Altieri, Donaldson or Ms. Harris. And I have never seen any paperwork that would allow me to make an independent judgment as to whether I have a conflict in this case.

So, given that I've never been formally assigned, or at least not noticed with such an assignment, given that I haven't received any materials from any source that would allow me to judge whether I have a disqualifying con- -- conflict, and given that I have seen no indication that there has been a judicially determined disqualifying conflict of any of my predecessors, it's my view that I am not currently counsel of record and I have no obligation to be such.

THE COURT: All right. Well, in -- in -- based on that explanation, what I'm going to do then is

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[Tr. 5] issue an Order to the Defender General, indicating that within 14 days he needs to provide the name to the Court of the attorney who will be representing Mr. Brillon, and if the Defender General Valerio needs paperwork from the Court or needs the

Court to do anything with regard to that, that's what the Court will do, as far as sending records to you or to anybody else, that's what the Court will do, but that's what I intend to do unless you have another suggestion.

MR. SLEIGH: No. I think that's fine. This is a somewhat unusual circumstance, at least procedurally, in terms of how I've been assigned to these so-called serious felony cases throughout the state in that typically we receive a notice, there's a form, you know, there's a form for everything, called Notice To Assign Counsel, which cites the statutory section, the Supreme Court Administrative Order No. 4, that says that there is a conflict of interest and states the reason. And, you know, that -- that's the document that usually gets me started, and I've never received such a document in this case.

THE COURT: Okay.

MR. MARTHAGE: Your Honor, the State has a suggestion.

THE COURT: Just one second; okay?

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[Tr. 6] MR. MARTHAGE: Excuse me.

THE COURT: So, you get that --

MR. SLEIGH: Usually, from the District Court Clerk.

THE COURT: And that's before you usually get the call from Lora Evans (inaudible)?

MR. SLEIGH: Sometimes I get them simultaneously, sometimes one shortly before the other, but usually, I mean, for all intense and purposes that happens all at the same time.

THE COURT: All right. Hold on one second. I've got Mr. Marthage and Mr. Brillon both --

MR. SLEIGH: Sure.

THE COURT: -- looking like they want to say something. So, Mr. Marthage.

MR. MARTHAGE: Your Honor, the Court's Order is effectively the same Order that Judge Suntag issued out about, I want to say somewhere between 30 and 45 days ago.

THE COURT: He issued an Order telling the Defender General to --

MR. MARTHAGE: Yes. And that's how we came to know that Mr. Sleigh was assigned to those cases. It's the State's sense that this is dragging and the --

THE COURT: Well, obviously.

* * *

[Tr. 7] MR. MARTHAGE: -- and it has for quite some time, and the problem now is assigning counsel.

So, given that it is -- it seems apparent that the Defender General had previously ignored Judge Suntag's Order, or not complied with it in such a manner that made representation of Mr. Brillon possible, the State would ask that the Court set a show cause hearing and set it for a relatively short period of time for the Defender General to either provide an explanation as to why counsel has not been assigned or to present an attorney before the Court who is ready to appear on Mr. Brillon's behalf. The State would ask that the Court set that up within the next 14 days.

THE COURT: Well, can you show me the Order by Judge Suntag that says the --

MR. MARTHAGE: It should be in the Court's file.

THE DEFENDANT: I've --

THE COURT: Well, that's why I'm asking you to show it to me --

MR. MARTHAGE: Okay.

THE COURT: -- because I don't see it.

MR. MARTHAGE: I did not bring my files down here. I have an entire file box. I can go – is that an Entry Order? I can go review it. I know that it was certainly an oral -- oral Order on the record. I also

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[Tr. 8] believe he reduced something to writing that I can get a copy for the Court.

MR. SLEIGH: Just for the Court's information, I've seen no such Order.

THE COURT: I, you know, I see the last thing I see in here that Judge Suntag signed was a Entry Order scheduling a motion to dismiss and replace assigned attorney filed by Mr. Brillon, to schedule that for a hearing, and that's the last I see.

MR. MARTHAGE: Okay. I believe there was a --

THE COURT: So, maybe --

MR. MARTHAGE: Yeah.

THE COURT: -- something was done on the record, but, you know, I think that that's maybe not the way to go because I don't want to waste anymore time, and if, as Mr. Sleigh indicates, you know, the -- the Defender General's Office through Ms. Evans did, in fact, contact him about this and, you know, there was some, I don't know what happened, but there was some miscommunication between that office and Mr. Sleigh or that -- this Court and Mr. Sleigh, you know, whether someone's actually going to be found in contempt is --

MR. MARTHAGE: Yeah.

THE COURT: -- pretty unlikely, so to put

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[Tr. 9] that down as a hearing seems to be a waste of time to me.

But let me just ask Mr. Brillon, you know, you're standing like you want to say something; however, before you say anything, you know, you are represented by an attorney; which attorney, we need to sort that out, but I don't know, you know, whether you want to speak at this point because you have, you know, your Fifth Amendment right not to.

THE DEFENDANT: All right. I won't mention -- go into the case at all. This has been going on probably two years now. They had 60 days to try me. And as far as Mr. Sleigh, he -- I -- I don't know why he heard that Ms. Gwendolyn Harris had conflicted out; she hadn't. She got a mistrial on another case which isn't the reason I'm being held without bail. There's Richard Ammons, Paul Donaldson and --

MR. MARTHAGE: Gerry Altieri.

THE DEFENDANT: -- and Altieri.

THE COURT: Okay. Well, he --

THE DEFENDANT: But --

THE COURT: -- he, if he is asked to, will look into the reasons for withdrawal.

THE DEFENDANT: I've gotten a letter a couple

weeks ago from the Defender General, well, actually, I think it was Lora Evans, who stated that she

* * *

[Tr. 10] had contacted the court clerk here in Bennington and they went over scheduling and everything, and -- and I have it. It's in Rutland, but it says that Mr. David Sleigh had gotten the assignment of counsel and that he'd be getting in contact with me immediately.

THE COURT: All right.

MR. MARTHAGE: Your Honor, if I might. The other problem the State foresees is that given what Mr. Sleigh has represented on the record as regards to his contract that it is entirely possible that he will not be assigned to this case.

THE COURT: Right. So, what I intend to do is issue an Order that that all be figured out between the Defender General or whoever, whether it's an ad hoc attorney or whoever they finally decide is representing Mr. Brillon –

THE DEFENDANT: Didn't we already do this?

THE COURT: -- that they let us know that within two weeks --

MR. MARTHAGE: Okay.

THE COURT: -- and if that means doing all the

contacting with Mr. Sleigh they need to do and all the conversations they need to have with somebody ad hoc that they do it, and we need a name within two weeks as to who is going to be representing Mr. Brillon. So, that's the

* * *

[Tr. 11] Order, Mr. Sleigh, that I'm going to send out and whether that is going to involve you in the future or not, I don't know.

MR. SLEIGH: Okay.

THE COURT: Okay?

MR. SLEIGH: Yeah. Thank you very much.

THE COURT: All right. Thank you.

MR. SLEIGH: Yeah. Bye.

THE COURT: Bye. All right.

MR. MARTHAGE: I do believe that I have something written from Judge Suntag, so I will go up and look for that right now. If I have it, I'll bring it right down.

THE COURT: Okay.

(Thereupon, the proceedings were concluded.)

* * *

[Tr. 12]

CERTIFICATE

I, Kelly DesLauriers, do hereby certify that the foregoing pages, numbered 2 through 11, inclusive, are a true and accurate transcription, to the best of my ability, of a tape-recorded hearing held on January 8, 2003, in the matter of State of Vermont vs. Michael Brillon held in the Bennington District Court.

Kelly DesLauriers
Transcriber

PETITIONER'S BRIEF

111

(3)

No. 08-88

Supreme Court, U.S.
FILED
NOV 17 2008
OFFICE OF THE CLERK

In the Supreme Court of the United States

STATE OF VERMONT,
Petitioner,

v.

MICHAEL BRILLON,
Respondent.

On Writ of Certiorari to the Vermont Supreme Court

PETITIONER'S BRIEF ON THE MERITS

CHRISTINA RAINVILLE
Counsel of Record

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Counsel for Petitioner

November 17, 2008

BOTH 00500000046 SEED

QUESTIONS PRESENTED

1. Whether delays caused solely by a defendant and his public defender(s) can arise to a speedy trial right violation, and be charged against the State pursuant to the test in *Barker v. Wingo*, 407 U.S. 514 (1972), on the theory that public defenders are paid by the state (with a small "s").

2. Whether the right to counsel, as established in *Gideon v. Wainwright*, 372 U.S. 335 (1963), should result in broader speedy trial rights to indigent defendants than defendants who are able to retain private counsel, such that only delays by private counsel get charged against the defendant under the *Barker v. Wingo* test.

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INTRODUCTION

In what appears to be a first in the history of American jurisprudence, the Vermont Supreme Court has vacated a felony conviction and barred a retrial on Sixth Amendment speedy trial grounds even though the trial delays at issue were caused *solely* by the defendant and his assigned attorneys, while the prosecution time after time objected to the delays. While every other state and federal court across the country has ruled that delays caused by a defendant's counsel are charged against the defendant under the *Barker v. Wingo*, 407 U.S. 514, 530 (1972) test, the Vermont Supreme Court found that a constitutional speedy trial violation supposedly had occurred based on the unique theory that the delays of defendant and his publicly-funded counsel were part of "the criminal justice system provided by the state." Pet. App. 27. Accordingly, even though the Vermont Supreme Court did not find any fault whatsoever with the prosecution, the court directed the trial court to vacate the conviction and dismiss the case with prejudice. Pet. App. 38.

This ruling turns thirty-six years of settled jurisprudence into chaos. Public defenders and court-appointed counsel now have the incentive to delay cases in the hope that their clients may one day go free due to the delay. Indeed, indigent criminal defendants who face certain conviction and lengthy sentences would have every incentive to delay. This case is a perfect example. Here, the defendant had six different assigned lawyers because: he fired his first lawyer (Pet. App. 19), his second lawyer withdrew due to a conflict (*id.*), he

fired his third lawyer (and also threatened him, forcing his withdrawal) (Pet. App. 20), he fired his fourth lawyer (Pet. App. 20-21), and his fifth lawyer withdrew due to modifications in his contract with the Office of the Defender General (Pet. App. 22-23).

The fact is, were it not for Brillon's own conduct, this case would have been tried expeditiously. The prosecution was ready to go to trial within seven months of Brillon's arraignment, and Brillon's first lawyer was also largely ready by that time. Indeed, the trial court denied Brillon's motion for a continuance and was pressing the case to trial for February 2002, when Brillon fired his first lawyer. Despite Brillon's firing of his first lawyer, and the withdrawal of his second due to a conflict, Brillon's third counsel was essentially ready for trial within a year of the arraignment. Again, Brillon prevented the trial, this time by threatening the attorney's life, thereby forcing his withdrawal. Brillon then went on to fire his fourth lawyer. By firing three lawyers, Brillon essentially won the lottery with a "get-out-of-jail-free card" made entirely by his own doing.

Moreover, with this decision, the Vermont Supreme Court has wrongly applied the right to counsel in *Gideon v. Wainwright*, 372 U.S. 335 (1963), to create different classes of speedy trial rights for indigent and non-indigent defendants, each of whom receives different benefits and deficits. Under this ruling, indigent defendants have far greater speedy trial rights than those who retain private counsel. Delays caused by private counsel do not get charged to the State because those lawyers

are not employed by the state.[1] Indigent defendants are far better off: whatever happens, it is the State's fault.

But while their speedy trial rights are enhanced, indigent defendants are disadvantaged in other ways. For example, the State and the trial courts are put in the untenable position of having to consider requests for continuance differently when the request is made by a public defender, because any continuance granted to a public defender will be charged as though it was the prosecution that requested it. Thus, the State and the trial courts will be compelled to deny requests for continuance made by public defenders, and indigent defendants may be forced to trial before their counsel are ready. Moreover, the State and the trial courts will be reluctant to agree to any change in assigned counsel because the delays caused by such a change are attributable to the state. In a perverse way, while affording indigent defendants greater speedy trial rights, the indigent defendant otherwise is actually made worse off by the *Brillon* decision.

In short, the *Brillon* decision has created chaos in a vital area of criminal law. The State of Vermont urges the Court to vacate the decision.

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[1] We shall follow the Vermont Supreme Court's use of "State" to refer to the prosecution, and "state" to refer to the criminal justice system funded by the state of Vermont. *See* Pet. App. 4.

OPINIONS BELOW

The order and judgment of the District Court of Bennington County denying defendant's first speedy trial motion is reprinted at Pet. App. 75-79, and the District Court's order denying Defendant's renewed speedy trial motion is reprinted at Pet. App. 59-73. These orders are not otherwise published. The Vermont Supreme Court's decision reversing the district court is reprinted at Pet. App. 3-58 and is published at *State v. Brillon*, 955 A.2d 1108 (Vt. 2008).

JURISDICTION

The Vermont Supreme Court rendered its decision on March 14, 2008, Pet. App. 3, and denied rehearing on April 16, 2008. Pet. App. 81. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury. . . .

STATEMENT OF THE CASE

Michael Brillon was charged with felony domestic assault for striking his girlfriend on July 30, 2001. Pet. App. 3-4. Because Brillon had three prior felony convictions, he was also charged as a

habitual offender, making him eligible for a life sentence pursuant to 13 V.S.A. § 11. Pet. App. 4. Brillon was found guilty after a jury trial in June of 2004, and sentenced to 12 to 20 years. Pet. App. 24.

The causes of this three-year delay are not in dispute. The day before his case was scheduled for jury draw, which was to begin on February 26, 2002 – less than seven months after Brillon's arraignment – Brillon discharged his public defender. Pet. App. 19. The trial court reassigned the case to the first level conflict counsel, a private attorney who had contracted to serve when the public defender had a conflict.[2] The first level conflict counsel reported that he had a conflict of interest, so the court reassigned the case to the second level of conflict counsel (Brillon's third lawyer). Pet. App. 19-20. Three months later, in May of 2002, Brillon tried to fire this new lawyer as well. Pet. App. 20.

Rather than simply grant Brillon's request, the trial court held a hearing during which *Brillon's counsel indicated that he was prepared and had ample time to go forward.* J.A. 216-219. But then,

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[2] Vermont funds its public defender system on a statewide, rather than local, basis. The state legislature sets the budget for the Office of Defender General, and the Office of Defender General distributes those funds across the state, including to the Bennington County Public Defenders Office, and to private counsel who are retained under contract to serve as conflict counsel when the Public Defender is removed from a case. *See* 2008 Vt. Laws 90, Sec. 16 and 13 V.S.A. § 5251. Such private counsel are retained in a predetermined order (first level, second level, etc.)

confronted with the prospect of an impending trial, Brillon managed to derail the proceedings by threatening his lawyer during a break in the hearing, so that the lawyer was forced to move for withdrawal. J.A. 223-226. Due to Brillon's own conduct, the trial court thus had no choice but to assign the case to the third level of conflict counsel – Brillon's fourth lawyer. J.A. 226. In November 2002, Brillon requested that his fourth lawyer be fired, and a hearing was held. At the hearing, Brillon complained that the lawyer did not return his telephone calls. J.A. 236. Confronted with Brillon's behavior, the lawyer advised the court that his contract with the Office of the Defender General had expired, and that he was seeking to have the case reassigned. J.A. 232-233. The court then granted Brillon's motion to dismiss his counsel – the third lawyer that Brillon had fired.

Once again, on November 26, 2002, the court ordered the Office of Defender General to assign a new lawyer to Brillon. J.A. 24. Brillon's fifth lawyer was assigned according to court records on January 15, 2003. J.A. 25. Three months later, that lawyer sought to withdraw due to modifications in his contract with the Office of the Defender General. Pet. App. 22-23. For the following four months, Brillon was without counsel, and he filed a pro se motion to dismiss his case due to the delay in bringing his case to trial. *Id.* Brillon's sixth, and final, lawyer was assigned to the case on August 1, 2003. Pet. App. 23. On February 23, 2004, Brillon's sixth lawyer filed a motion to dismiss for lack of a speedy trial. Pet. App. 24. The trial court denied the motion on April 19, 2004, finding that much of

the delay was the result of defendant's own actions and that defendant had failed to demonstrate actual prejudice. *Id.* Defendant's trial took place in June, 2004, and he received a sentence of twelve-to-twenty years in prison. *Id.*

A sharply divided Vermont Supreme Court reversed, by a three-to-two vote. The majority found that:

> Given these facts, we conclude that a significant portion of the delay in bringing defendant to trial must be attributed to the state, even though most of the delay was caused by the inability or unwillingness of assigned counsel to move the case forward. The defender general's office is part of the criminal justice system, and ultimately it is the court's responsibility to assure that that system prosecutes defendants in a timely manner that comports with constitutional mandates. While some of the delay in this case certainly is attributable to defendant, a significant portion is attributable to the criminal justice system provided by the state.

Pet. App. 27-28.

The dissent, written by Justice Burgess, contended that, "Today the majority frees a convicted woman beater and habitual offender, not because of any infirmity in the evidence or unfair prejudice in the trial by which a jury found him

guilty, but because the defendant delayed the proceedings for almost twenty-two months." Pet. App. 39.

SUMMARY OF THE ARGUMENT

The Court should vacate the decision of the Vermont Supreme Court for two reasons.

First, the Court should reverse the Vermont Supreme Court's ruling and hold that these delays, caused *solely* by a defendant and his counsel, cannot constitute a speedy trial right violation under *Barker v. Wingo*.

Second, the Court should also reverse the Vermont Supreme Court's decision because the Vermont ruling impermissibly creates different constitutional speedy trial rights for indigent and non-indigent defendants, both granting indigent defendants broader rights than those who can retain private counsel, while at the same time placing indigent defendants in peril of having their cases pushed to trial before their counsel are ready, or being forced to go to trial with a lawyer who otherwise would have been permitted to withdraw. While Brillon has argued that this argument was not raised before the Vermont Supreme Court and that this Court, therefore, cannot consider the argument, his point is without merit. To begin with, the State did raise the argument in its Motion for Reargument. Moreover, this Court can consider new arguments when they merely enlarge the Federal question considered below. Finally, it is also within

this Court's discretion to consider Federal questions even though they were not raised in the state courts.

ARGUMENT

I. ALL OF THE DELAYS IN THIS CASE WERE CAUSED BY BRILLON OR HIS COUNSEL.

There is no dispute that the three-year delay in getting this case to trial was caused exclusively by Brillon, Brillon's various counsel, and the Office of the Defender General. The State played no role, whatsoever, in the delay, and instead, worked diligently to press the case to trial. Because the responsibility of Brillon and his counsel for these delays should be controlling under *Barker v. Wingo*, the State will discuss them at length here.

Largely due to his own conduct, Brillon had six different lawyers between the time of his arraignment and the time of the jury's verdict.[3] We will discuss each lawyer in turn.

A. Brillon Fired His First Lawyer, Richard Ammons.

This case would have been tried within approximately six months of Brillon's arraignment by Brillon's first lawyer had Brillon not fired him to delay the case.

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[3] Because this case was decided on direct appeal (rather than after a post-conviction hearing alleging ineffective assistance of counsel), there is little in the record setting forth exactly what each lawyer did, or did not do.

Brillon's first lawyer, Richard Ammons, was employed as a public defender in the Bennington County Public Defender's Office. J.A. 13. Mr. Ammons represented Brillon from the time of the arraignment on July 30, 2001 until February 25, 2002.

The docket entries show that Mr. Ammons filed a motion to recuse the Judge (the Honorable Karen R. Carroll) on October 3, 2001. J.A. 15. Brillon wanted a different judge because Judge Carroll had handled Brillon's family court matter, and Brillon claimed that she was prejudiced against him. Judge Carroll denied the motion to recuse, and forwarded it to the administrative judge, who also denied the motion. J.A. 80.

However, Brillon still had the possibility of removing Judge Carroll from the case. Judges in Vermont rotate in and out of the various counties, and Judge Carroll was scheduled to rotate out of Bennington County in March of 2002. J.A. 108-109. This planned rotation gave Brillon every incentive to delay the trial. If Brillon could possibly delay the trial past March, he would be guaranteed a different judge – despite having lost the motion to recuse.

Meanwhile, the State was diligently pushing for trial. On December 28, 2001, the State filed a motion requesting that the case be placed on the trial list for February. J.A. 89. In that motion, the State said that "depositions and documentary discovery are complete." *Id.* Clearly, Mr. Ammons had already taken a number of depositions, and the

docket entries for January 9, 15 and 16, 2002 show that Mr. Ammons had taken at least twelve depositions by then. J.A. 18.

Mr. Ammons responded by moving to delay the case, with the filing of a motion for a continuance. J.A. 91. Continuing to push for trial, the State objected to the continuance. J.A. 94. The court denied the motion on January 23, 2002. J.A. 19. Mr. Ammons filed a second motion for a continuance on February 22, 2002. J.A. 97. Judge Carroll held a hearing on February 22, 2002. Tellingly, Mr. Ammons asked for a continuance "to at least April." J.A. 164. Of course, by April, Judge Carroll would have rotated out of Bennington County, so granting such a continuance would have had the same effect as granting the motion to recuse the judge.

In his motion, and at the hearing, Mr. Ammons complained about his caseload, and said, without offering any support, that the public defender's office was supposedly "under funded and under staffed." J.A. 165. In fact, as noted above, counsel had completed all of the depositions, including *two* depositions of the victim. J.A. 167-168.

Mr. Ammons also claimed that potential "new" witnesses had come to Mr. Ammons' attention "this past week." J.A. 169-170. However, Mr. Ammons forthrightly told the court that, "there are some ethical issues with regard to my using these people as witnesses, and beyond that, it would be, I think, inappropriate for me to elaborate further." J.A. 169.

Mr. Ammons also claimed that he had to speak to the victim's doctor, and that he wanted to take a vacation in March. J.A. 173. In its continuing effort to get the case to trial, and because the State believed that the logical inference to be drawn was that defense counsel's unsupported motion for a continuance was designed to get the trial moved until April, by which time Judge Carroll would have rotated to another county, the State objected to Mr. Ammons' second request for continuance. The State argued that the motion was "just part and parcel of an effort by the defense to have the Court not hear this matter ...." J.A. 180.

At the close of the hearing, Judge Carroll denied the motion for continuance, and the case was scheduled for jury draw on February 26, 2001, J.A. 20-21, less than seven months after Brillon's arraignment. Having failed twice to delay the trial, Brillon turned to his fallback strategy – to delay the trial by getting rid of his counsel. The following on-the-record conversation ensued with Brillon (who appeared through interactive television, J.A.162):

> MR. AMMONS: Mr. Brillon wanted to say something. Mr. Brillon, this is Rick. You and I can speak privately, and if you have other issues you want me to raise, we'll raise them before the Court that way. Okay?
>
> THE DEFENDANT: Ms. Carroll, before you go anywhere – What? She doesn't want to hear me or what?

COURT OFFICER: We're through now.

THE DEFENDANT: You're fired, Rick.

J.A. 186-187. There was no discussion of why Brillon fired Mr. Ammons at that time.

Three days later, on February 25, 2002, Mr. Ammons filed a motion to withdraw, noting, among other things, that Brillon had fired him on February 22, 2002. J.A. 103. Again, the State objected. J.A. 196. The court held a hearing that same day, and Mr. Ammons said that Brillon's firing him "is certainly the triggering factor," but that there were other reasons that were "alluded to" in his motion, and that he was not "in a position to give factual" details. J.A. 192-193. Mr. Ammons and the court continued to allude to these ethical issues throughout the hearing:

> MR. AMMONS: ... I think the quality of the relationship between myself and Mr. Brillion [sic] has been compromised significantly to the point that I cannot adequately represent him. Our relationship has suffered and beyond that, I'm reluctant to say more.

J.A. 194.

> THE COURT: ... What bothers me at this point is that due to the recent events . . . that Mr. Ammons is now saying he cannot zealously represent Mr. Brillion [sic], and that is what concerns the Court

> because the Court can't require an attorney to violate his ethical obligations.

J.A. 198-199.

> THE COURT: Well, okay. My take on it was in order not to prejudice his client further, the two of them had considerations after our meeting here on Friday that leads Mr. Ammons to believe he can't effectively represent his client without – by having him go into the detail of that, I think that those conversations could prejudice the Court as far as statements that may have been made by Mr. Brillion [sic] to Mr. Ammons, but Mr. Ammons can speak to that.
>
> MR. AMMONS: That's essentially it . . . .

J.A. 200.

Over the State's continuing objection, J.A. 199, the court granted Mr. Ammons' motion to withdraw. As a result, Brillon got the delay he wanted and a new judge.

In sum, the only reason Brillon's case was not tried within seven months after his arraignment, in February of 2002, was because Brillon fired Mr. Ammons on the eve of trial. The State was ready for trial, and the trial court obviously thought that Mr. Ammons was ready as well, as the court denied his motion for a continuance.

B. Brillon's Second Lawyer, Matthew Harnett, Withdrew Due to a Conflict.

The court next assigned the case to Mathew Harnett on February 28, 2002. J.A. 21. The next day, the Office of the Defender General informed the Court that Mr. Harnett had a conflict, and a new lawyer, Gerard Altieri was assigned to the case. *Id.*

C. Brillon Tried to Fire his Third Lawyer, Gerard Altieri, and, When that Failed, Brillon Threatened Altieri's Life, Thereby Forcing his Withdrawal.

Brillon's third lawyer, like his first, was ready to expeditiously proceed to trial as the State continued to press the case forward, until Brillon again managed to force his lawyer off the case.

Gerard Altieri represented Brillon from March 1, 2002 through June 11, 2002. One month into the representation, on April 2, 2002, Mr. Altieri filed a Notice of Self Defense. J.A. 21. But, by May, Brillon was dissatisfied, and he filed a motion to dismiss Mr. Altieri. J.A. 113. Brillon raised five grounds: that Mr. Altieri supposedly had not filed motions that defendant was entitled to; that there was supposedly "virtually no communication whatsoever from attorney," that Mr. Altieri supposedly had not provided him with copies of discovery material; that Mr. Altieri supposedly had refused to create an attorney-client relationship; and that Mr. Altieri supposedly had claimed that he could not be diligent because of his case load. *Id.*

The court (the Honorable John Wesley) held a hearing on the motion to dismiss counsel on June 11, 2002. The State once again objected to the dismissal, noting that:

> I honestly have concerns about counsel being repeatedly appointed. The State has seen cases like that where a delay of years is involved because the defendant isn't happy with the facts. Not that he isn't happy with his counsel.

J.A. 221.

Mr. Altieri disagreed with most of Brillon's claims. He noted that he had not sent Brillon some deposition transcripts, J.A. 207, but he took issue with everything else. He said that Mr. Ammons had taken twelve depositions and done a full evidentiary hearing, and that, while Brillon wanted "for me to somehow bring in a lot of people ... I don't want to use the words trash, but impeach Mrs. Tatro. I'm not sure that stuff is admissible." J.A. 216-217. Mr. Altieri went on to say, "And you have seen me try complex cases before and I'm willing to work with the man, but I cannot do a lot of things he wants me to do, and I am not the first attorney he's fired." J.A. 218. Mr. Altieri continued that, "if Mr. Brillion wants me to go on a fishing expedition and haul in people and relatives just to trash his wife, I don't think a judge is going to allow me to do that. At least not in front of the cases I've tried downstairs. And if it's not relevant, I think it could hurt the case potentially in front of a jury." *Id.*

Despite Brillon's conduct, Mr. Altieri argued that he should remain on the case. He told the court that he had not "had the case that long and I think we do have a vital trial strategy"; and that there were "very few motions to file ... and I can do that ...." J.A. 218-219.

Clearly, with both Mr. Altieri and the State in agreement that Mr. Altieri should remain as counsel, Brillon's motion to dismiss Mr. Altieri did not look promising. So, Brillon took action to make sure that Mr. Altieri was off the case: during a break, he threatened his lawyer's life.

When the parties returned from the break, the following discussion occurred on the record:

> MR. ALTIERI: One further issue. I asked Mr. Brillion [sic] during the break if he still wanted me to represent him and I think I'll let him address that, but I think he emphatically said no and I understand that but I won't tolerate the threats to my life. I won't tolerate that. And maybe before you make those threats you should learn a little bit about my background, but this man could fill you in on –
>
> THE DEFENDANT: Yeah, I know. You're all buddies. That's what concerns me.
>
> THE COURT: Mr. Altieri.

MR. ALTIERI: I don't take threats to my life -

THE DEFENDANT: I didn't threaten you. I told you you did not need to work in collusion.

THE COURT: Mr. Brillion [sic], I have been trying as hard as I can to conduct in a judicious fashion, and I will remind everyone in the courtroom now. You don't talk to one another. You talk to the Court.

MR. ALTIERI: As I was saying, I'll make the threat very specific and I'll use the foreign language to describe the expletive that was said. But it was, "If it takes 20 years to get even with you, I will get you." And I have heard these threats before from you, Michael, because I have represented you before, so at this state I don't see how I want to stay on this case. Normally I would, but you start threatening my life, I take that very seriously.

THE DEFENDANT: I threatened your life, Gerry?

MR. ALTIERI: Yeah. You said you'd take 20 years - -

* * *

> THE COURT: I'm not concerned with Mr. Ammons. I want you to focus on the issue with Mr. Altieri. Mr. Altieri has just indicated to you that you threatened him.
>
> THE DEFENDANT: I didn't threaten his life.
>
> THE COURT: Did you say, "If it takes me 20 years, I'll get you."?
>
> THE DEFENDANT: That's not exactly what I said, sir ....

J.A. 223-226.

Judge Wesley then granted the motion to dismiss Mr. Altieri, telling Brillon that, "this is somewhat of a dubious victory in your case because it simply prolongs the time that you will remain in jail until we can bring this matter to trial ...." J.A. 226. Judge Wesley then said that, "I will be in contact with the District Court Clerk this afternoon to ask her to make a diligent search for counsel. I can't promise you at this point how long that will be because I know for a fact that our resources for ad hoc counsel are perilously thin." J.A. 227.

In sum, at this point, Brillon's counsel made clear on the record that the case was essentially ready for trial – for the second time, within a year of Brillon's arraignment. Certainly, the State was ready. The *only* reason that there was any additional delay was the need, once again, to find

new defense counsel because Brillon threatened his lawyer's life.

D. Brillon Fired his Fourth Lawyer, Paul Donaldson.

Brillon's fourth lawyer, Paul Donaldson, was assigned later that same day, on June 11, 2002. J.A. 23. Two months later, Brillon wrote a letter to the Judge complaining that Mr. Donaldson was not qualified to be his lawyer. J.A. 153. Then, on October 22, 2002 – again, on the eve of trial – Brillon moved to dismiss Mr. Donaldson. J.A. 115. Brillon's motion to dismiss Mr. Donaldson is nearly identical to the motion he filed to dismiss Mr. Altieri. *Id.*

A hearing was held on November 26, 2002 before the Honorable David Suntag. Brillon complained, not that Mr. Donaldson was not competent (as he said in his letter), nor that Mr. Donaldson failed to file motions or provide copies of discovery (as he said in his motion), but merely that Mr. Donaldson failed to return his phone calls. J.A. 236.

Mr. Donaldson did not respond to those complaints, but instead explained that his contract with the Defender General had expired in June, and that he had had discussions with the Defender General about getting the case reassigned "because of the nature of the case." J.A. 233. Mr. Donaldson further said that, "My discussion with the Defender General's office have been for quite some time since the contracts were up were can I get some of these cases – some case relief on some of these cases and

his case is one of these cases that – that, uh, we had discussed getting some relief on, I mean, because of the seriousness of the case." J.A. 234-235.

The court asked Brillon whether Brillon wanted to have Mr. Donaldson fired "based on everything," and Brillon responded, "Exactly." J.A. 237. The court agreed to dismiss Mr. Donaldson, and the State requested that the case be scheduled for a status conference in thirty days, as "Our concern is that even if counsel gets assigned that somehow the case is going to fall through the cracks." J.A. 240-241. The court indicated that there would be a status conference scheduled as soon as they knew who the new attorney would be. J.A. 241.

E. Brillon's Fifth Lawyer, David Sleigh, Withdrew Due to Changes in His Contract with the Office of the Defender General.

Five days later (which included the Thanksgiving Holiday), on December 2, 2002, the Office of the Defender General notified Brillon's fifth lawyer, David Sleigh, that the case was assigned to him. J.A. 155. For some reason, the court was not notified of this appointment until January 15, 2003. *Id.*

On February 25, 2003, Mr. Sleigh moved to continue the various deadlines, due to the fact that he had been on trial in Chicago for much of the month of February. J.A. 117. But then, on April 10, 2003, Mr. Sleigh filed a Notice of Withdrawal, J.A.

118, due to "modifications" in his firm's contract with the Defender General. J.A. 158.

F. Brillon's Sixth Lawyer, Kate Moore, Took Brillon's Case to Trial.

On April 21, 2003, Brillon filed a pro se motion to dismiss his case "For Lack of a Prima Facie Case," in which he also asked to be allowed to proceed pro se. J.A. 123. On May 7, 2003, Brillon filed a pro se motion to "Dismiss in the Interest of Justice," in which he also asked to be allowed to proceed pro se. J.A. 135. The court initially scheduled a hearing on these motions, but then continued the hearing until a new attorney became available. J.A. 28.

For nearly four months between April 10, 2003 and August 1, 2003, Brillon was without a lawyer. There is little indication of why this was so in the court record, other than a June 20, 2003 letter from the Office of the Defender General to the court clerk. J.A. 159. In that letter, the Business Manager explains that the Defender General had received funding to provide a fourth serious felony unit, and that Kate Moore would be hired as of August 1, 2003. *Id.*

Ms. Moore was assigned as Brillon's counsel on August 1, 2003. After initially filing a motion to extend the deadlines, she got up to speed and filed a number of motions in the following months, including a motion to dismiss, a motion to compel discovery, a motion to bifurcate, a motion to transfer the defendant to a nearby correctional facility, at

least two motions in limine, and multiple objections to various State notices. J.A. 28-32.

The trial began on June 15, 2004, and the jury convicted. J.A. 39. Thereafter, Ms. Moore filed many additional motions, including a motion for judgment of acquittal, a motion for a new trial, a renewed motion to dismiss, and a motion to withdraw the jury waiver and dismiss the habitual offender enhancement. J.A. 40.

* * *

In sum, even though Brillon's trial took place nearly three years after his arraignment, there was not a single delay that was attributable to the prosecution. All of the delays were caused directly by Brillon (by firing three lawyers, and threatening one of those three); or indirectly by Brillon (by firing three lawyers and threatening one of them, he made it extremely difficult for the Defender General to obtain replacement counsel); or by his counsel. The prosecution was ready to try the case in February of 2002 (less than seven months after the arraignment), and, had Brillon not fired his first attorney, the attorney undoubtedly would have been ready by that time as well. Despite Brillon's firing his first lawyer, Brillon's third counsel was ready to go to trial within a year of Brillon's arraignment, and the trial did not go forward *only* because Brillon threatened that lawyer's life. The prosecution objected time and again to Brillon's delay tactics, and diligently pressed the case forward at every opportunity.

II. UNDER *BARKER V. WINGO*, DELAYS CAUSED BY THE DEFENSE SHOULD NOT BE CHARGED TO THE PROSECUTION.

In this case, the Vermont Supreme Court held that a speedy trial violation occurred even though, as discussed above, there is no dispute in the record that: (1) every day of delay was the result of the actions of defendant and his counsel; (2) the State never requested a continuance, and objected, time and again, to the motions for delay that the defense filed; (3) the prosecution made clear that it was ready for trial within six months of Brillon's arraignment; (4) after Brillon delayed the case by firing his first lawyer in what appears to have been a purposeful act to avoid trial, his third lawyer represented that he was nonetheless essentially ready for trial within a year of arraignment – at which point, Brillon threatened the attorney's life, forcing further delay due to the need to once again appoint replacement counsel; and (5) subsequent delays were wholly the fault of Brillon's counsel. As a result, Brillon was freed with no chance of reprosecution.

The holding of the Vermont Supreme Court is constitutionally untenable. It is flatly inconsistent with the historical basis for the speedy trial right, this Court's controlling decision in *Barker v. Wingo*, and virtually every state and federal decision following *Barker v. Wingo*.

The Sixth Amendment to the Constitution provides that, "In all criminal prosecutions, the

accused shall enjoy the right to a speedy trial ...." The Constitutional right to a speedy trial predates not only the Constitution but also the Magna Carta (1215), with the earliest written references going back to 1166. *See Klopfer v. North Carolina*, 386 U.S. 213, 223-34 (1967).

Over 100 years ago, this Court described the purpose behind the speedy trial right and subsequent speedy trial statutes as a protection against abuses of government:

> It is doubtless true that in some cases *the power of the government has been abused, and charges have been kept hanging over the heads of citizens*, and they have been committed for unreasonable periods, resulting in hardship. With a view to preventing such wrong to the citizen, statutes have been passed in many states similar to the one under consideration, in aid of the constitutional provisions, national and state, intended to secure to the accused a speedy trial.

United States v. Cadarr, 197 U.S. 475, 478 (1905) (emphasis added).

Clearly, this is not a case where the government has kept "charges . . . hanging over the head" of a defendant. To the contrary, the State consistently pressed for trial while the defendant and his counsel consistently sought delays. This hardly conforms to the historical circumstances that

lead to speedy trial protections – undeserved punishment inflicted on citizens merely by charging and incarcerating them for lengthy periods with no effort to bring them to trial.

In *Barker v. Wingo*, 407 U.S. at 530-31, this Court established a four-part balancing test "which courts should assess in determining whether a particular defendant has been deprived of his [speedy trial] right." The Court identified four factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) the prejudice to the defendant. The issue in this case involves only item (2), the reason for the delay.

Under *Barker*, there is no basis for holding that delays caused by the defendant or his counsel could rise to a constitutional speedy trial violation. Indeed, this Court noted that defendants often delay prosecution *intentionally*:

> A second difference between the right to speedy trial and the accused's other constitutional rights is that deprivation of the right may work to the accused's advantage. *Delay is not an uncommon defense tactic.* As the time between the commission of the crime and trial lengthens, witnesses may become unavailable or their memories may fade. If the witnesses support the prosecution, its case will be weakened, sometimes seriously so. And it is the prosecution which carries the burden of proof. Thus,

> unlike the right to counsel or the right to be free from compelled self-incrimination, deprivation of the right to speedy trial does not per se prejudice the accused's ability to defend himself.

407 U.S. at 521 (emphasis added).

In this case, there is ample evidence that many of Brillon's delays were intentional. For example, when Brillon's efforts to continue the case to a time when Judge Carroll would have rotated out of the county failed, he fired his first lawyer, Mr. Ammons, and thereby ensured that he would have a new judge. Similarly, when he tried to fire his third lawyer, Mr. Altieri, and it appeared that he would not succeed in that effort – and that, as a result, the case would go to trial shortly thereafter – he threatened Mr. Altieri's life, forcing a withdrawal. Furthermore, Brillon knew, because the judge told him when he attempted to fire Mr. Altieri, that ad hoc counsel resources were "perilously thin," J.A. 227, (especially since Brillon had, by then already worked his way through three attorneys). Nonetheless, Brillon went ahead and fired his fourth lawyer, Mr. Donaldson, as well. It was Brillon's actions – firing three lawyers, and threatening the life of one of those three – that set into motion all of the delays that followed.

In fact, under the reasoning of *Barker v. Wingo*, and its recognition that delay can be caused by and be in the interest of a defendant, any claim of a speedy trial violation should not be cognizable after the point when Brillon prevented the trial by

firing his first attorney, and certainly not after he threatened the life of his trial-ready third attorney and forced his withdrawal. There is absolutely nothing in the record suggesting any subsequent conduct by the prosecution to intentionally delay trial that might even theoretically revive Brillon's speedy trial claim.

The mere fact that Brillon's counsel – including the attorney whose life Brillon threatened – were state-appointed does not somehow create a constitutional speedy trial violation where none otherwise exists. To the contrary, in *Barker v. Wingo*, when describing factor (2) (the reason for the delay), this Court never even suggested the possibility that a speedy trial violation could be caused by a defendant or defendant's counsel, private or appointed. The Court only described the reasons for delay in terms of acts by the prosecution or the courts:

> Closely related to length of delay is the reason the government assigns to justify the delay. Here, too, different weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid

> reason, such as a missing witness, should serve to justify appropriate delay.

407 U.S. at 531.

The Vermont Supreme Court quoted this language regarding "overcrowded courts," and "the ultimate responsibility for such circumstances must rest with the government," *see* Pet. App. 16, but failed to recognize the important distinction between overcrowded courts (where, presumably, one case among many may get lost in the shuffle), and a situation where, as here, defendant and his counsel are solely responsible for the delay. In any event, there was no issue here of overcrowded courts, nor is there any evidence of negligence on the part of the State or the judicial system.

Indeed, the record shows only that, after firing three lawyers and having a fourth lawyer conflicted out, Brillon created a situation where the Office of the Defender General, through no fault of its own, had difficulty finding a replacement. Such difficulties, in a rural state like Vermont with a paucity of criminal lawyers, are understandable, particularly where a criminal defendant threatened to kill his third lawyer. The fact that Brillon was exhausting the supply of assigned counsel, and the possibility that many lawyers might have been loathe to represent Brillon, was Brillon's fault, and no one else's. To premise a constitutional speedy trial violation on such circumstances, which were wholly the fault of the defendant who fired his first counsel, and then threatened and forced the withdrawal of this trial-ready third attorney, is

completely illogical. While it is theoretically conceivable that a systemic under-funding of the program for appointing defense counsel could create a constitutionally cognizable issue if speedy trial violations were occurring in case after case, there is absolutely no such record or claim here.[4]

Not only does nothing in *Barker* support the result that the Vermont Supreme Court reached here, numerous circuit courts have made clear that delays caused by defendants and/or defense counsel cannot arise to a speedy trial act violation. *See, e.g.*, *Rashad v. Walsh,* 300 F.3d 27, 34 (1st Cir. 2002), *cert. denied*, 537 U.S. 1236 (2003) (noting that when "delay is caused by defendant, delay does not count

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[4] The majority stated that, "Because of the limited record before us in this case, we cannot be sure if this case represents an aberration or a growing crisis in the provision of defender general services in Vermont." Pet. App. 5. In fact, there was no evidence whatsoever on this score. As the dissent made clear, that there was no record of a lack of public-defender resources:

> the majority's concern that delay in this case may have been due to inadequate public-defender resources is unsupported by the record. While the defender general obviously had trouble finding counsel during the fourteen months following defendant's threat to his second lawyer, this difficulty appeared no more attributable to lack of resources than to ordinary conflicts of interest, attorney retirement, contract modification, and defendant's own misconduct. None of the delay was shown to be caseload related.

Pet. App. 47.

against the state at all"); *Gattis v. Snyder*, 278 F.3d 222, 231 (3d Cir. 2002), *cert. denied*, 537 U.S. 1049 (2002) (noting that, "If the delay is attributable to the defendant, 'he will be deemed to have waived his speedy trial rights entirely,'" *citing, United States v. Manning*, 56 F.3d 1188, 1195 (9th Cir. 1995)); *Robinson v. Whitley*, 2 F. 3d 562, 571 (5th Cir. 1993) (holding that the Sixth Amendment "does not permit a criminal to take advantage of a delay that his own conduct occasioned"); *United States v. Brock*, 782 F.2d 1442 (7th Cir. 1986) (holding that the two and one-half-year delay after defendant's guilty plea did not violate the right to a speedy trial; delay was the result of defendant's actions); *United States v. Gomez*, 67 F.3d 1515 (10th Cir. 1995), *cert. denied*, *Gomez v. U.S.*, 516 U.S. 1060 (1996) (holding that twelve and one-half month delay did not rise to the level of a constitutional violation; delay attributable to the government was weighed against it only slightly because there was no indication of an attempt to gain a tactical advantage).[5] State courts have tended to follow this pattern as well.[6]

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[5] In addition to these cases that we have cited in the First, Third, Fifth, Seventh, Ninth and Tenth Circuits, district courts in the remaining circuits also follow this trend. *See, e.g.*, *State v. Maiito*, 2008 WL 907542, at 3 (Conn. Super. March 18, 2008) (finding no constitutional speedy trial violation, in part because, "the record here unambiguously indicates that the defendant bears primary, if not sole, responsibility for the delay..."); *Vanlier v. Carroll*, 535 F. Supp. 2d 467, 478 (D. Del. 2008) (holding in part that, "Delays attributable to the defendant are not weighted against the Government"); *State v. Pittman*, 647 S.E. 2d 144, 156 (S.C. 2007) (finding that defendant's right to a speedy trial was not violated where there was no indication of prosecutorial negligence or intentional delay and defendant had contributed to the delay by asserting

complex defenses); *Payne v. Rees*, 738 F.2d 118, 123 (Ky. 1984) (noting that there was no speedy trial violation where, "There was no deliberate effort by the prosecution in this case to delay the trial, rather there was a negligent failure to proceed."); *State v. Woodruff*, 2008 WL 2415316, at 2 (Minn. App. June 17, 2008) (holding that defendant's right to a speedy trial had not been violated based in part because, "there is no evidence that the state intentionally delayed the proceeding and appellant, through his defense counsel, contributed to the delay..."); *Kramer v. State*, 652 S.E.2d 843, 846 (Ga. Ct. App. 2007) (finding no speedy trial violation where, "the delay resulted from numerous continuances from the trial calendar requested by and granted to Kramer...[T]hese delays cannot be attributed to or weighted against the State.")

[6] See, e.g., *People v. Chavez*, 650 P.2d 1310, 1313 (Colo. App. 1982) (finding no violation where delay was based on defense counsel's inability to try case within the speedy trial deadline); *Thomas v. State*, 933 So. 2d 995, 997 (Miss. Ct. App. 2006), *cert. denied*, 933 So.2d 982 (Miss. Jul 20, 2006) (noting that "Any delays in the prosecution caused by the defendant are not counted against the State when evaluating an alleged speedy trial violation"); *People v. Simpson*, 34 A.D. 3d 934, 939 (N.Y. App. Div. 2006) (finding that there was no speedy trial violation because "Any delay in the trial was due to proceedings initiated by the defense or ongoing plea negotiations and there is no evidence that the defense was impaired by the delay."); *Davis v. State*, 133 P.3d 719, 723 (Alaska Ct. App. 2006) (finding that delay attributed to defense attorney's request for additional time would toll the speedy trial clock); *Gamble v. State*, 85 S.W.3d 520, 524 (Ark. 2002) (noting that delays resulting from the defense requesting continuances or refusing to obtain counsel should not be charged against the state for speedy trial purposes); *People v. Griffin*, 365 N.E.2d 487, 490 (Ill. App. Ct. 1977) (finding that, "Since Griffin, through his attorney, was responsible for the continuance granted...statutory right to a speedy trial was not violated."); *Murray v. State*, 967 So. 2d 1222, 1226 (Miss. 2007) (noting that, "any delay attributable to Murray would toll the running of the 270-day statutory period."); *State v. Craig*, 739 N.W.2d

It is equally important that delays caused by the Office of the Defender General in its administration of counsel not be charged against the State. Whether one considers the four-month delay in assigning counsel to Brillon in April of 2002, or adds to that calculation the time for the two lawyers who had changes in their contracts, these delays would never have occurred if Brillon had not fired Mr. Ammons and Mr. Altieri. There is no evidence of any bad faith on the part of the Defender General, and there is good cause to believe that the difficulties in finding replacement counsel were likely due to Brillon's threat on Mr. Altieri's life. It would be one thing if this were a case where the Defender General had been suffering from insufficient resources and struggling with systemic delays, but the record shows the opposite. The Defender General immediately assigned five of the six different counsel to Brillon. Once Mr. Sleigh withdrew, the Defender General sought and promptly obtained more funds from the legislature to hire Ms. Moore. *See* J.A. 159-160.

More importantly, however, is the fact that the Office of the Defender General has every incentive to win the freedom of the defendants who are represented. It would be entirely inappropriate to permit individuals convicted of violent crimes to walk away unpunished because of delays caused by the Defender General, when the Defender General is trying to obtain that very result through the normal

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206, 214 (Neb. Ct. App. 2007) (finding that delay solely attributable to the accused will toll the speedy trial period).

means (with motions to dismiss, jury trial acquittals, etc.). Again, in a perverse way, if the Court permits administrative delays by the Defender General to be attributed to the State, the Defender General will now have every motive to delay assigning counsel.

Moreover, when considering the specific issue here – delays caused by a defendant who has changed his court-appointed counsel – the courts are unanimous in finding no speedy trial violation.[7]

Against this overwhelming backdrop, the Vermont Supreme Court relied on two state court decisions that do not even suggest that a

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[7] *See, e.g.*, *Roberson v. State*, 864 So. 2d 379, 394 (Ala. Crim. App. 2002), *cert. denied*, (May 16, 2003) (finding no speedy trial violation where defendant was represented by five different attorneys during the pendency of the proceedings, all of whom withdrew due to defendant's uncooperative behavior); *United States v. Lagasse*, 269 F. App'x 87 (2d Cir. 2008) (finding no speedy trial violation where defendant's decision twice to discharge his counsel contributed to the delay); *United States v. Sutcliffe*, 505 F.3d 944, 957 (9th Cir. 2007) (finding no speedy trial violation where defendant sabotaged his relationship "with each appointed attorney, necessitating the delays"); *United States v. Brown*, 498 F.3d. 523, 531 (6th Cir. 2007) (finding no speedy trial violation where defendant sought new counsel); *State v. King*, 580 S.E.2d 89, 93 (N.C. Ct. App. 2003) (finding no speedy trial violation where delay was "largely due to defense counsel's trial preparation and the withdrawal of several attorneys due to conflicts with defendant"); *State v. Fischer*, 744 N.W. 2d 760, 770 (N.D. 2008) (finding no speedy trial violation where delays were due to defendant's "dissatisfaction with his attorneys, which resulted in multiple changes of court-appointed counsel"); and *People v. Kaczmarek*, 798 N.E. 2d 713, 719 (Ill. 2003) (finding no speedy trial violation where defendant was represented by six different attorneys).

constitutional speedy trial violation occurred in the present case. The Vermont Supreme Court relied on dicta in *People v. Johnson*, 26 Cal. 3d 557, 571 (1980), where the California Supreme Court stated that the purpose of the speedy trial right is to protect defendants against delays caused by "not only the prosecution, but the judiciary and those whom the judges assign to represent indigent defendants," but the California court nonetheless affirmed the conviction. Furthermore, under the California law at issue, a finding of a speedy trial violation would "not result in defendants' escaping trial for serious crimes they may have committed." *Id.* at 573. Clearly, the California law and the decision in *Johnson* do not support the Vermont Supreme Court decision in *Brillon*.

The Vermont Supreme Court also relied on an appellate decision from New Mexico, *State v. Stock*, 147 P.3d 885, 891 (2006), where the New Mexico court of appeals dismissed a conviction due to speedy trial violations, finding that "both parties bear some responsibility for the delay." The New Mexico Court found that some of the delays were caused by "the neglect of his overworked public defenders," *Id.* at 676, but that the state, too, was responsible. The court found that the state acted with "bureaucratic indifference," which was worse than mere negligence, in doing nothing to move the case forward. *Id.* at 892. Unlike the prosecution in *Stock*, here there is no dispute that Brillon's delays were all caused by Brillon and his counsel, and that the State consistently opposed delay and pressed for trial.

In sum, no other court has ever vacated a conviction and barred a retrial for speedy trial violations where the defendant or his counsel caused all the delays. The reason is obvious. Defendants already have multiple strategic reasons to cause a delay. *See Barker v. Wingo*, 407 U.S. at 521. If the Court were to permit defense delays to result in unconditional freedom regardless of guilt, the floodgates would open as defendants would try, as Brillon did, to work the system to their ultimate benefit. Quite clearly, providing this incentive would turn the historical rationale and the rule of this Court's cases on its head and makes no constitutional sense. Moreover, as discussed below, it would create different speedy trial rights for indigent and non-indigent defendants.

III. THE *BRILLON* DECISION IMPROPERLY CREATES DIFFERENT SPEEDY TRIAL RIGHTS WITH DIFFERENT BENEFITS AND DEFICITS FOR INDIGENT AND NON-INDIGENT DEFENDANTS.

As we have just discussed, the Vermont Supreme Court's decision is flatly inconsistent with core speedy trial rationales. Moreover, the decision at issue provides different speedy trial rights to indigent defendants than defendants who are able to retain private counsel, since only delays by private counsel get charged against the defendant under the *Barker v. Wingo* test. However, while affording indigent defendants greater speedy trial rights, the Vermont ruling also puts indigent defendants at an inherent disadvantage because the State (and the

trial courts) must treat every request for a change of counsel and every request for continuance as though it will be charged against the State for speedy trial purposes. Accordingly, indigent defendants are now in peril of being forced to trial before their counsel is ready, and with counsel who otherwise would have been permitted to withdraw, while defendants who can afford counsel do not face these risks.

Creating a different rights structure for indigent and non-indigent defendants violates the basic premise of our criminal justice system and is constitutionally impermissible. In *Gideon v. Wainwright*, 372 U.S. at 344, this Court made clear that the right to counsel was required in order to make every defendant "equal" under the law:

> From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

The constitutional defect of a system with different speedy trial rights for indigent and non-indigent defendants is confirmed by the practical effects for each class of defendant. While all defendants facing a likely conviction and a lengthy sentence may chose as a strategic matter to delay trial in the hope that prosecution witnesses may

move away or forget the events, such a decision of intentional delay always came with a price: the defendant would have to waive his speedy trial rights. Under the ruling in *Brillon*, however, indigent defendants no longer have this concern. If they delay by firing their assigned counsel, or if their public defender delays by doing nothing for an extended period of time, all of that delay may be charged against the State under the *Barker v. Wingo* test. Indeed, under *Brillon*, intentional delays may succeed not only in undermining the prosecution's case, but in eliminating the case altogether by getting the case dismissed for speedy trial violations *caused by the defense*. In contrast, defendants who retain counsel do not have this right. Delays caused by private counsel, or by a defendant who retains private counsel, are all charged to the defendant because his lawyer is not funded by the state. This kind of inequality, determined solely on who pays the lawyer, defies the fundamental purpose behind *Gideon*.

At the same time, the Vermont Supreme Court's decision has, in practice, put indigent defendants at a certain and significant disadvantage. Under the *Brillon* ruling, all delays caused by an indigent defendant or publicly-funded counsel are now charged against the State under the *Barker v. Wingo* test, including every change in assigned counsel, and every continuance. As a result, the State is required to assess requests for a change in counsel and for continuance differently for indigent and non-indigent defendants. If the request that will result in a delay is made by private counsel, the State need not be concerned that the delay might

result in a speedy trial violation. On the other hand, the State must look at every request for delay by a publicly-retained lawyer with close scrutiny and likely oppose the request, as every delay will be charged to the State. The courts likewise would necessarily be reluctant to grant any request by an indigent defendant that would cause delay. As a result, the State and the courts are put in the untenable position of treating indigent defendants differently solely because their counsel is retained by the state. Indigent defendants may by forced to trial before their counsel is ready, or may be denied a change in counsel, solely because those delays may one day add up to a speedy trial violation. However, private counsel will continue to have all the time they require. These differences, providing different advantages and disadvantages depending on whether a defendant is indigent or non-indigent, are inconsistent with the fundamental premise of *Gideon* – that all defendants should be treated equally.

In sum, the Vermont Supreme Court has opened a Pandora's box, by crossing a line that no other court has dared to cross, and creating complete chaos in the legal system. The State of Vermont urges this Court to vacate the Vermont Supreme Court's ruling, and to establish a rule that prevents this outcome.

IV. THE COURT HAS JURISDICTION TO CONSIDER THE STATE'S POLICY ARGUMENT.

Brillon's claim that this Court cannot consider the State's argument in Section III, because it was purportedly not raised before the Vermont Supreme Court, *see* Respondent's Brief in Opposition, State of Vermont v. Michael Brillon, No. 08-88 (S. Ct. Aug. 12, 2008), is completely without merit for three reasons. To begin with, the argument at issue was presented to the Vermont Supreme Court. Moreover, even if one assumes for the sake of argument that the argument was not presented, this Court can consider arguments raised for the first time in this Court when the Federal question at issue was raised below and the argument merely enlarges the Federal question. Finally, it is also within the Court's discretion to consider a Federal question not raised below.

A. The State Did Raise These Arguments in the Vermont Supreme Court.

First, although Appellee claims that the State did not raise the second question before the Vermont Supreme Court, that is not accurate. Although the State did not raise this argument in its initial state-court briefs or oral argument, the State did raise the argument in its Motion for Reargument, and the Vermont Supreme Court was afforded the opportunity to consider the argument (it declined to do so).

This Court has repeatedly held that federal questions presented to the state courts for the first time in a petition for rehearing (the equivalent of Vermont's procedure of a motion for reargument) can be "sufficiently well presented to the state courts to support [this Court's] jurisdiction." *See, e.g., Taylor v. Illinois*, 484 U.S. 400, 406 n.9 (1988) (considering claim raised for the first time in a petition for rehearing in the Illinois Appellate Court); *Hathorn v. Lovorn*, 457 U.S. 255, 264-65 (1982) (considering claim raised for the first time in a petition for rehearing). *Cf. Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 128 (1945).

The State clearly presented these arguments in its Motion for Reargument, which stated in pertinent part that:

> [T]he Court should reconsider its decision in light of the public policy concerns that this decision creates. The Court's decision will have a detrimental effect on the relationship defendants have with their public defenders. Under the decision, defendants will now be encouraged to object to continuances requested by their counsel, even if the continuances are in the client's best interest. Indeed, defendants will be encouraged to change counsel as often as possible in the hope that mere delay will force their freedom.
>
> The Court's decision will have a chilling effect on replacing public

> defenders when a defendant seeks new counsel. As a result of this decision, the State must now oppose requests for a change of counsel because it will necessarily cause a significant delay. Similarly, courts will hesitate to assign new counsel when defendants request it.
>
> Lastly, the Court's decision will push poor defendants – those who have public defenders – to trial even though their counsel may need more time to prepare a defense, while allowing wealthier defendants who retain private counsel to request continuances without consequence. Prosecutors and the courts can no longer agree to reasonable continuances requested by public defenders due to concern that the continuances may be applied against the State and the case dismissed on speedy trial grounds. The end result is that poor defendants may be pushed to trial before their counsel is ready, while wealthy defendants will have all the time they require.

J.A. 149-150. Clearly, the argument was raised before the Vermont Supreme Court, and the state court therefore was afforded the opportunity to decide the issue. It declined to do so, and now the argument is ripe for this Court's consideration.

In addition, it is important to note that the State did not raise this argument before the Vermont Supreme Court in its initial brief because it was simply unfathomable that the Vermont Supreme Court would rule as it did, and it was only in the aftermath that the State realized the broad ramifications of the decision.

Once the Vermont Supreme Court rendered its decision, the State analyzed the decision, and then struggled to operate in the new landscape it created. It became readily apparent at that time that all requests for continuance by publicly-funded lawyers, and all requests for a change of publicly-funded counsel, could count against the State for speedy-trial purposes. As a result, the State was put in the untenable position, as described above, of having to consider such requests differently depending on whether the lawyer who made the request was publicly-funded. The State realized, immediately after the decision, that this created an important public-policy concern, and raised this issue in its Motion for Reargument.

Accordingly, the Court should consider the issue because it was raised in the State's Motion for Reargument, and, in addition, could not reasonably have been raised any sooner.

B. This Court May Consider Arguments Raised for the First Time in This Court.

Even if one were to assume for the sake of argument that the argument was not raised in the state courts (despite the evidence to the contrary),

this Court could still consider the argument for two separate reasons: first, because it merely enlarges the Federal question that was decided by the Vermont Supreme Court; and second, because it may be within the Court's discretion to consider Federal questions not raised in the state courts below.

1. The Court may consider new arguments that merely enlarge the Federal question decided below.

The Court may consider the State's second argument because the argument merely enlarges the underlying Federal question that was argued and decided in the state court below.

Although the Court generally will not review a question presented unless it was "either addressed by or properly presented to the state court," *see, e.g., Howell v. Mississippi*, 543 U.S. 440, 443 (2005), *quoting Adams v. Robertson*, 520 U.S. 83, 86 (1997), the Court has made clear that this rules does not apply to arguments that merely enlarge the Federal question presented. Indeed, it has been the rule since at least 1899 that, "Parties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed." *Dewey v. Des Moines*, 173 U.S. 193, 197-98 (1899). As the Court said in *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 379 (1995), *citing, Yee v. City of Escondido, California*, 503 U.S. 519, 534 (1992), "Our traditional rule is that '[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties

are not limited to the precise arguments they made below.'" *See also Illinois v. Gates*, 462 U.S. 213, 220 (1983), where the Court explained further that, "We have not attempted, and likely would not have been able, to draw a clear-cut line between cases involving only an 'enlargement' of questions presented below and those involving entirely new questions."

This is precisely the case here. The Federal question – whether delays caused by an indigent defendant's public defender can arise to a speedy trial violation – was decided by the Vermont Supreme Court. Indeed, the Vermont Supreme Court expressly ruled that "the inaction of assigned counsel or a breakdown in the public defender system ... is attributable to the prosecution and not defendant." Pet. App. 5. The State's second argument here – whether the right to counsel should result in broader speedy trial rights to indigent defendants – merely enlarges the first argument by explaining the ramifications of such a change in the existing law.

The cases cited by Brillon support this distinction between cases which present an entirely new Federal question, and those which merely present new arguments in support of the Federal question which was raised in the state court below. For example, in *Illinois v. Gates*, *supra*, 462 U.S. at 217, this Court, after granting certiorari "to consider the application of the Fourth Amendment to a magistrate's issuance of a search warrant on the basis of a partially corroborated anonymous informant's tip," requested that the parties brief an additional issue – whether the exclusionary rule

should be modified. The Court then decided that the issue of modification was not presented to the state courts, and decided instead to "consider the question originally presented in the petition for certiorari." *Id.* In doing so, however, the Court made clear that there is an important distinction between Federal questions that were never raised below, and issues that are "so connected with [the substantive Fourth Amendment right at issue] as to form but another ground or reason for alleging the invalidity" of the decision below. *Id.* at 223, *citing Dewey v. Des Moines*, 173 U.S. at 197-98.

Similarly, in *Adams v. Robertson, et al.*, 520 U.S. at 92, the Court dismissed certiorari as improvidently granted because the entire Federal question before the Court was never raised in the state courts. In *Adams*, the Federal question – whether the certification and settlement of the class action dispute violated the Due Process Clause of the Fourteenth Amendment – was never raised by the parties nor discussed by the state courts. *Id.* at 86. The same is true for *Howell v. Mississippi*, 543 U.S. at 443, where the petitioner "did not cite the Constitution or even any cases directly construing it, much less any of this Court's cases." The Court therefore concluded that the petitioner "did not . . . raise this claim in the Supreme Court of Mississippi, which unsurprisingly did not address it." *Id.* at 441. And the petitioner's claims in *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) had the same fatal flaw, as "the sole federal question argued here had never been raised, preserved, or passed upon in the state courts below."

In contrast, here, both parties cited *Barker v. Wingo* in the briefs in the Vermont Supreme Court, and the court decided the entire appeal based on the application of the *Barker v. Wingo* factors. Clearly, that Federal question was both "pressed" and "passed on" by the Vermont Supreme Court. The State's second argument here merely enlarges the very issue that the Vermont Supreme Court decided. Accordingly, the Court should consider the argument.

2. The Court May Also Have the Discretion to Decide Federal Questions that were not Presented Below.

Finally, the Court may also consider the State's second argument for the additional reason that the Court may have the authority to use its discretion to consider a Federal question even if the question was never raised in the state court below.

This Court has never decided whether the limitation on Federal questions that were subject to the "not pressed or passed upon below" rule in deference to state supreme courts is jurisdictional or prudential. *See, e.g., Howell v. Mississippi*, 543 U.S. at 445-446, *citing, Adams v. Robertson*, 520 U.S. at 90 (noting the split among prior cases, and determining that "we need not decide today 'whether our requirement that a federal claim be addressed or properly presented in state court is jurisdictional or prudential ....'"); *Illinois v. Gates*, 462 U.S. at 222-23 (noting that, "Whether the 'not pressed or passed upon below' rule is jurisdictional, as our earlier

decisions indicate ... or prudential, as several of our later decisions assume ... we need not decide").

In this case, where one of the most fundamental principles of criminal law is at issue, it would be prudent to consider all arguments. For this reason as well, the Court should consider the State's argument.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Vermont Supreme Court, and hold that delays caused solely by Brillon and his publicly-retained counsel cannot amount to a speedy trial violation.

Respectfully submitted,

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RESPONDENT'S BRIEF

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IN THE

Supreme Court of the United States

STATE OF VERMONT,

Petitioner,

v.

MICHAEL BRILLON,

Respondent.

On Writ of Certiorari to the Vermont Supreme Court

RESPONDENT'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1. Does the state bear responsibility under *Barker v. Wingo*, 407 U.S. 414 (1972), for pretrial delays in the following circumstances:

a. When the state fails to assign counsel?

b. When the state assigns pro forma counsel who provide nothing in the way of representation before their contractual duty to represent the defendant lapses, and they withdraw?

c. When the court continues a case, which it has deemed ready for trial, for seven months, in part because of a backlog of similar high-priority cases on the docket, and then allows two trial dates to pass *sine die* without explanation?

d. When the prosecutor is dilatory in providing discovery and a witness list?

2. Whether the Vermont Supreme Court correctly balanced the four *Barker* factors in furtherance of the private, public and institutional interests which the speedy trial clause is intended to protect?

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STATEMENT OF THE CASE

The nearly three years between Brillon's July 30, 2001 arraignment and his June 14, 2004 trial began and ended with the normal activities of pretrial preparation. In between was a lengthy period of inaction punctuated by continuances, withdrawals of counsel, and missed dates.

The Vermont Supreme Court counted none of the time between arraignment and June 11, 2002 against the State's speedy trial clock. Pet. App. 24-25. After this first period, however, the court found that much of the delay in getting Brillon's case to trial "was not attributable to defendant, but to the system." Pet. App. 7. The Court summarized its findings:

> Defendant's fourth attorney, who was assigned in June 2002, stated at an August 2002 status conference that he needed an additional two months to prepare the case, and yet he apparently did little or nothing and finally conceded at a November 2002 status conference that his contract with the defender general[1] had expired and he was giving up criminal defense work. A fifth attorney was not formally assigned until January 2003, and he was allowed to withdraw four and one-half

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[1] Vermont's defender general is the state officer in charge of assigning counsel for indigent defendants. He may do this through state-employed public defenders, private lawyers engaged as "assigned counsel contractors," or "ad hoc" counsel assigned to individual cases. Vt. Stat. Ann. tit. 13 § 5253(a)-(b); Vt. Admin. Order No. 4 §§ 3-4, 6.

> months later without having done anything because of a change in his contract with the defender general's office. At that point, defendant had been incarcerated without a trial for approximately two years, and yet he was entirely without counsel for the next four months until the next assigned counsel took over in August 2003. Despite the already significant delay, the prosecution stipulated to several more continuances before a trial was finally held in June 2004.

Pet. App. 27.

The following Statement of the Case is divided into two parts. The first responds to Vermont's argumentative and inaccurate version of the case. Pet'r Br. 9-23. The second presents the facts as they appear in the record.

I. VERMONT'S FALSE PICTURE OF THIS CASE.

Vermont's brief improperly attempts to rewrite the record that the Vermont Supreme Court reviewed and relied on in reaching its fact-specific holding that administrative failures, not Brillon or his counsel, were responsible for four specific periods of delay. By putting most of its factual presentation in the "Argument" section, Vermont frees itself from the strictures of an objective statement, and exploits that strategy to spin a story. The story has a theme: that Brillon, despite his incarceration, despite what the record says and despite what courts below found and declined to find, secretly wanted to delay his case as long as possible and manipulated the

proceedings to that end. It has a surprise ending: that after delaying the case for almost three years, he managed to fool the Vermont Supreme Court into thinking that the delays were the State's responsibility, not his.

We summarize Vermont's story in indented text and point out its utter lack of record support.

> *Brillon wanted Judge Carroll disqualified from the case, but his motion to recuse was denied. Judge Carroll was scheduled to rotate to another county in March, so "Brillon still had the possibility of removing [her] from the case" by persuading his lawyer to move for a continuance. Pet'r Br. 10. "If Brillon could possibly delay the trial past March, he would be guaranteed a different judge." Id. So when the State moved for February trial, Brillon's public defender, Richard Ammons, responded with two continuance motions. "Tellingly," Vermont writes, Ammons sought a delay until April, by which time "Judge Carroll would have rotated out of Bennington County." Id. 11. When the judge denied the continuance, Ammons moved to withdraw for a number of reasons. The court allowed Ammons to withdraw and "[a]s a result, Brillon got the delay he wanted and a new judge." Id. 14.*

Neither the trial court nor the Vermont Supreme Court found any such facts. As the Vermont Supreme Court read the record, Ammons withdrew "because of [his] failure to be ready for trial, not because of defendant's actions." Pet. App. 25.

Ammons stated that he was carrying a caseload of 174 clients and that he was not prepared for trial. J.A. 97-99, 165-67.

Brillon heard Ammons state that he was not prepared on the Friday before a Tuesday jury draw. *Infra* 8-10. The Vermont court found that Brillon consented to Ammons' withdrawal only grudgingly, because it was apparent that Ammons, by his own admission, was "not prepared to go forward with a trial." Pet. App. 19. The court nevertheless did not charge this time against the state. *Id.*

> *The trial date was cancelled and on March 1, 2002, Brillon was assigned new counsel, Gerald Altieri. Judge-shopping was no longer a motive, but Brillon still wanted to delay the case as long as he could. He moved for a substitute for Altieri in May, complaining about Altieri's lack of preparation and communication. "Mr. Altieri disagreed with most of Brillon's claims." Pet'r Br. 16. Altieri was prepared to stay on the case, so, "confronted with the prospect of an impending trial, Brillon managed to derail the proceedings by threatening his lawyer during a break in the proceedings." Id. 6, 17-19.*

In fact, Altieri admitted that most of Brillon's factual assertions were true, though he defended his efforts. J.A. 206, 216-17. No trial was "impending" at the time; the earliest a trial could be had was in September. *Id.* 219. Nothing in the record suggests that Brillon's outburst was a ploy designed to delay the trial. We provide the details at 11-13, *infra*. The

Vermont court held that this period also should not be counted against the state. Pet. App. 25.

> *Altieri was replaced by Paul Donaldson, whom Brillon then "fired." Pet'r Br. 20. Brillon wrote to the judge complaining "that Mr. Donaldson was not qualified to be his lawyer. . . . Then, on October 22, 2002 – again on the eve of trial – Brillon moved to dismiss Mr. Donaldson." Id. "Confronted with Brillon's behavior," Vermont writes, Donaldson then "advised the court that his contract with the Office of the Defender General had expired, and that he was seeking to have the case reassigned." Id. 6.*

The Vermont Supreme Court found, and the record establishes, that Donaldson was allowed off the case because his contract had expired and the defender general's office (hereafter, "DG") was seeking to have the case reassigned. Pet. App. 27. There is no substance to the claim that Donaldson withdrew for any reason connected "with Brillon's behavior." Furthermore, Donaldson's withdrawal did not result in the cancellation of any trial date. The court had scheduled the trial for October, but for reasons which the record does not explain, October had passed with no trial and no new date for one. J.A. 23-24; *infra* 14-15.

> *Brillon was then left with no lawyer at all, a situation he brought upon himself, because "by firing three lawyers and threatening one of them, he made it extremely difficult for the Defender General to obtain replacement*

counsel . . . ." Pet'r Br. 23. The difficulty was understandable, because "a rural state like Vermont" has "a paucity of criminal lawyers." Id. 29. Brillon is also to blame for a second reason: because "there is good cause to believe that the difficulties in finding replacement counsel were likely due to Brillon's threat on Mr. Altieri's life." Id. 33.

Donaldson, as noted, was allowed out of the case for contract reasons (as was David Sleigh, the attorney who was appointed to replace him). The record does not establish the claimed "paucity of criminal lawyers." The "good cause to believe" that "Brillon's threat on Altieri's life" had anything to do with the six months of unrepresentation is pure fantasy.

II. THE RECORD FACTS.

Part I of this Statement of the Case was required in order to correct the misleading and factually inaccurate version of the case tendered to the Court by Vermont's brief. We now provide the Court with a correct account of the relevant facts of record.

A. July 27, 2001 to July 30, 2001.

On July 27, 2001, Brillon and his estranged girlfriend, Michelle Tatro, met in her home and began arguing. When Michelle left, Brillon followed her to her car and struck her in the face. The police were called and Brillon was arrested. Pet. App. 8-9.

On July 30, 2001, Brillon was charged with domestic assault. J.A. 11-12. Because he was

forbidden by an earlier criminal court order from harassing his girlfriend, he was charged with second-degree aggravated assault, a felony offense. Vt. Stat. Ann. tit. 13, § 1044(a)(1). Because he had three prior felony convictions, he was charged as a habitual offender under Vt. Stat. Ann. tit. 13, § 11, exposing him to a life sentence. Pet. App. 3-4, 9.

B. July 30, 2001 to February 25, 2002.

The public defender was assigned to represent Brillon. Marie Wood of the Bennington public defender's office appeared at his arraignment on July 30. July 30, 2001 Tr. 1. The court ordered Brillon held without bail pending an evidentiary bail hearing, later scheduled for August 15. J.A. 13-14.

Richard Ammons took over the case from Wood. The day before the bail hearing Ammons and the prosecutor stipulated to a continuance because Ammons, who had started at the public defender's office the previous month, was moving his former practice that day. Pet. App. 17-18; J.A. 97.

On September 20 Brillon wrote to the court complaining of delay. J.A. 151. *See* Pet. App. 29-30.

The bail hearing was convened on October 2, 2001, but before it began Ammons requested a continuance so that he could file a motion to recuse the trial judge, Hon. Karen Carroll, who had presided over a family-court dispute arising from the charged assault. Ammons stated that the delay resulting from the motion would not count toward any speedy-trial claim. Oct. 2, 2001 Tr. 3.

The next day, Ammons moved to recuse Judge Carroll.[2] Appellant's Printed Case ("P.C.") 22.[3] The motion was denied by Judge Carroll on October 9, and by an administrative judge on November 20. J.A. 16.

February 2002 trial date. On December 27, the prosecutor requested that a trial date be set not later than February 2002, noting that Brillon had been in custody for five months and representing that discovery was complete. J.A. 89-90. Ammons filed no opposition and the court granted the request. Pet. App. 18; J.A. 17.

The bail hearing was held on January 16, 2002, and the court denied bail that day. Pet. App. 18.

The next day, January 17, Ammons moved for a trial date continuance on the ground that further investigation was necessary. J.A. 91-93. Judge Carroll denied the motion and set the jury draw for February 26, with trial to begin the next day. Pet. App. 18-19.

On February 22, Ammons filed a second motion for a continuance. He represented that he was unready for a February trial because of extraordinary caseload pressures, and asked that the

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[2] The Vermont Supreme Court and the Solicitor General mistakenly identify the recusal motion as "pro se." Pet. App. 18, Amicus Br. of United States 3.

[3] The "printed case" is a paginated collection of "such extracts from the record as are necessary to present fully the questions raised," filed in the Vermont Supreme Court. Vt. R. App. P. 30(a).

trial be postponed until April. J.A. 97. According to Ammons, when he joined the public defenders' office on July 1, he inherited a backlog of "unfinished and untouched cases," *id.* 97-98, which his predecessor had "allowed . . . to sit, quite frankly," *id.* 165, and he was also taking on his share of incoming cases. As of the motion date, he was carrying a caseload of 174 clients with 331 charges, 55 of which were felonies. Because of his partner's vacation schedule, he was the only full-time attorney in the office. *Id.* 97-99, 165-67. He had learned of new witnesses whom he thought would be relevant, but there were ethical issues, which he preferred not to discuss, about using them. *Id.* 169-70.

The court denied the motion. At the end of the hearing, Brillon, who had listened to the proceedings by telephone, told Ammons, "You're fired, Rick." Pet. App. 19; J.A. 187.

On February 25, one day before the jury draw, Ammons filed a motion to withdraw, representing that Brillon had "discharged" him at the close of the previous hearing because of Ammons' failure to be ready for trial and to maintain communications, and because of "certain irreconcilable differences in preferred approach . . . as to trial strategy." J.A. 103-106. Ammons also claimed conflicts of interest based on the public defenders' representation of newly-interviewed witnesses. *Id.* 105. At a hearing the same day, Ammons said he had been advised to withdraw by the DG. *Id.* 191-92. The court warned Brillon that granting the motion would mean further delay, but Brillon stated that he had no choice

because Ammons was not prepared for trial. *Id.* 197. The court granted the motion to withdraw, ordered appointment of a new lawyer, and scheduled a status conference in 30 days. *Id.* 21; Pet. App. 19.

C. February 25, 2002 to June 11, 2002.

The court appointed a replacement for Ammons, Matthew Harnett, an assigned counsel contractor, on February 28, 2002. The following day, Harnett reported a conflict of interest. J.A. 21; Pet. App. 19-20.

On March 1, the court appointed another assigned counsel contractor, Gerald Altieri. J.A. 21; Pet. App. 19-20.

September or October 2002 trial date. No new trial date appears on the docket after the February 26 jury draw was cancelled. J.A. 21-23. Some time between February 26 and June 11, however, both Altieri and the prosecutor learned that Brillon's case was not going to be put on a jury list before September 2002. By the time of the June 11 hearing, Altieri understood that the case was not "coming up on the trial radar until September at the least. . . ." *Id.* 219. The prosecutor agreed and explained his understanding:

> Mr. Altieri and I apparently had the same conversation with either the judge or the clerks downstairs that the backlog related to other cases and specifically other 60-day

> cases[4] necessitated Mr. Brillon being put off because he brought up – he was brought up to the eve of trial. He had the trial dates reserved and he did not use them.

Id. 220-21.

The status conference that Judge Carroll had ordered thirty days from February 25 was not scheduled on the docket and was not held. *Id.* 21. No status conference was held in March. *Id.* No status conference was held in April. No hearing of any kind was held until June 11. *Id.* 21-22.

On April 2, Altieri filed a notice that Brillon intended to use "the doctrine of self-defense." *Id.* 21. That was Altieri's only docketed filing in the case. *Id.* 21-23.[5]

On May 20, Brillon filed a motion for substitute counsel, alleging that Altieri had not filed motions, had virtually no communication with Brillon, had not provided Brillon with discovery material, and told Brillon that "he [Altieri] cannot be diligent because of [his] heavy case load." *Id.* 113-14; Pet. App. 20.

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[4] *I.e.*, cases in which a defendant is held without bail for an offense not punishable by death or life imprisonment. Vt. Const. ch. II, § 40.

[5] The notice read in full: "Now comes the defendant, Michael Brillon, by and through undersigned counsel and pursuant to V.R.Cr.P. 12.1 and hereby gives notice that he intends to utilize the doctrine of self-defense in the above-entitled action." P.C. 54.

At the June 11 hearing Brillon represented that Altieri had spoken with him twice since his assignment in March, once for twenty minutes and another time for about ten minutes, "in the hall and it must have been ten guys lined up to see him." J.A. 208-09, 212. Brillon complained that Altieri had not spoken to his witnesses and had not given him the discovery completed by Ammons. *Id.* 211-13. Altieri said he had spoken with Brillon "for almost two hours." *Id.* 207. As for the depositions, Altieri conceded that Brillon "may have a valid complaint. I haven't gotten him all the depositions he wants." *Id.* Altieri acknowledged he had not spoken to Brillon's witnesses, though he disagreed whether it was necessary. *Id.* 216-17. He acknowledged that motions needed to be filed, but he believed he still had time to do so because the case would be tried in September at the earliest. *Id.* 218-19.

In the course of the hearing Brillon and Altieri engaged in heated, hostile exchanges. The judge, Hon. John P. Wesley, threatened both of them with contempt if they continued their in-fighting. *Id.* 214, 216, 225.

Towards the end of the hearing Altieri stated that during a break Brillon told Altieri "emphatically" that Brillon did not want Altieri as his lawyer, "and I understand that but I won't tolerate the threats to my life." *Id.* 224. He continued, addressing Brillon, "maybe before you make those threats you should learn a little bit about my background. . . ." *Id.* Brillon denied he had threatened Altieri's life. *Id.* 224, 225. According to Altieri, Brillon stated, "If it

takes 20 years to get even with you, I will get you." *Id.* 224.

The court granted Altieri leave to withdraw based on the "breakdown" in their relationship, and warned Brillon that he was not entitled to manage every aspect of his defense and that appointing a new lawyer would result in further delay. *Id.* 226-28.

D. June 11, 2002 to November 26, 2002.

On June 11, the same day that Altieri was removed, attorney Paul Donaldson, another assigned counsel contractor, was assigned. *Id.* 23; Pet. App. 20.

No other action appears on the docket in June 2002. J.A. 23. No other action appears on the docket until July 30, when a status conference was set for August 5. *Id.*

At the August 5 conference, Donaldson represented that there was "a lot of discovery that [Brillon's] prior attorneys never got to for one reason or another," and asked for additional discovery time to interview six to eight additional witnesses. Aug. 5, 2002 Tr. 3, 6; Pet. App. 21. Donaldson found it "difficult to say" how much additional time he needed, given his "other case load" and "other obligations," but he thought that two months could be "less than adequate." Aug. 5, 2002 Tr. 4.

October 2002 trial date. The court ordered the defense to file objections in writing to any of the State's offered "bad act" evidence by August 23 and to disclose its additional witnesses by September 16. J.A. 23; Pet App. 21. The court ordered the

prosecution to file any motions regarding defense disclosures by September 23. J.A. 23. The Court ordered the case to be placed on the October jury list, "with priority given due to Defendant's custody status." *Id.*; Pet. App. 21.

On August 23, the deadline to file defense oppositions to the State's "bad act" evidence, Donaldson filed nothing. J.A. 23.

On August 28, Brillon wrote a letter to Judge Wesley (filed but not docketed) indicating his concern about Donaldson's inaction and lack of response to his letters. P.C. 66; Pet. App. 21.

On September 16, the deadline to file disclosure of defense witnesses, Donaldson filed nothing. J.A. 23.

No docket entries in September or October establish a date certain for an October jury draw in Brillon's case. The docket indicates no cancellation of the October trial and no rescheduling or other action by the clerk or the judge. *Id.* 23-24.

On October 22, Brillon filed a pro se motion asking that Donaldson be replaced. *Id.*; Pet. App. 21. Brillon stated that Donaldson had not filed motions, had refused to provide Brillon with discovery materials, and had engaged in "virtually no communication." J.A. 115.

Donaldson filed no response. *Id.* 24.

October passed with no jury draw and no new date for a jury draw. *Id.* 23-24.

Sometime in late October, as revealed at the next hearing, the DG sent Brillon a letter explaining that Donaldson would be replaced by Debra Loevy-Reyes. *Id.* 233-34.

On October 31, a hearing on Brillon's motion was scheduled for November 13. *Id.* 24. On November 13, Brillon was not transported from prison to court so the hearing was not held. *Id.* On November 15, the hearing was reset for November 26, 2002. *Id.*

The November 26 hearing was held before Judge David Suntag. *Id.* The judge asked Donaldson for his response to Brillon's motion. *Id.* 232. Donaldson replied as follows:

> Judge, I – by way of explanation, Judge, um, I've been going out of the private practice of criminal defense work. In fact, my contract with the Defender General's office had expired in June, which was in Mr. Brillon's case was (unintelligible) me basically the beginning of my departure from the contract. Um, I had been discussing with the Defender General's office in getting Mr. Brillon's case, among others, reassigned because of the nature of the case and just because it's, you know, the nature of the case.

Id. 232-33; *see* Pet. App. 21.

Donaldson further explained that, "I had been told by the Defender General's office that they were going to reassign the case. They were going to have new counsel assigned that was more able and more equipped to deal with the case." J.A. 233; Pet. App.

21-22. Donaldson produced the October letter from the DG to Brillon advising that Brillon's case was going to be assigned to Loevy-Reyes. J.A. 233-34. According to the prosecutor, Loevy-Reyes was "somewhere along the line of 7 or 8 months pregnant" and she "conveyed to me that she will be missing some time as a result of her pregnancy . . . ." *Id.* 234.

Judge Suntag understood that Donaldson would not be continuing his representation of Brillon:

> But I don't, and if what I'm hearing from Mr. Donaldson is that he's not going to be representing him anyway. I mean, it's not even a question of whether or not he's going to be dismissed from the case. If he doesn't have the contract any more, it's supposed to be reassigned in the first place anyway.

Id. At no point in the hearing did Donaldson dispute any of the allegations in Brillon's motion. *Id.* 232-35, 239-40.

The judge released Donaldson from the case:

> [T]his is what I'll do. Mr. Donaldson is going to be out, obviously, for all reasons, including yours [*i.e.*, Brillon's]. I'll release him from the case, contact the Defender General's office and tell him immediately assign whoever it is [that] you're going to assign, uh, to the case you know and have that person determine immediately whether or not she or he can do it and whether there's a conflict. And if not tell me and we'll get somebody else assigned and

> we'll just work it as quickly as we can in order to get you counsel.
>
> * * *
>
> We will . . . notify the Defender General to reassign immediately and I want a report within two weeks at the outside whether reassigned counsel has any conflict.

Id. 238-40.

E. November 26, 2002 to January 22, 2003.

On November 26, the docket states the following regarding Brillon's new counsel:

> Note: This defendant's cases are being reassigned to the Serious Felony Unit – David Sleigh. Lora Evans[6] to notify Atty Sleigh of the assignment, this court to send notice to Mr. Sleigh of next court date.

Id. 24-25. That same day, the clerk scheduled a status conference for January 8, 2003. *Id.* 25.

In December 2002, no action appears on the docket. *Id.*

On January 8, Judge Carroll presided over the status conference. *Id.* 25, 244. She stated, "I'm not exactly sure of the history of Mr. Sleigh's appointment or non-appointment to the case because I'm just sitting in today." *Id.* 244.

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[6] Lora Evans was the business manager at the defender general's office. J.A. 160.

Sleigh, whose office was in St. Johnsbury, about 160 miles from Bennington, *see* P.C. 77, was present by telephone. J.A. 243. Sleigh told the judge that he did not believe that he currently represented Brillon. *Id.* 244. Sleigh stated that he had been advised in December 2002 that he "might" be assigned to the case, but "[a]s far as I'm concerned, at this point I'm just another lawyer in Vermont." *Id.* He further stated that the DG had instructed him to review the file and determine if he had a conflict, but to that date he had received no further paperwork. *Id.* 244-45; Pet. App. 22. He added, "[a]ssuming that I receive a notice to assign [sic] counsel assigning me to this case which I have yet to receive," he would review it to see whether there was a conflict of interest involving prior counsel, "because my contract only obliges me to appear in cases where there has been a disqualifying conflict of interest by predecessor counsel." J.A. 245-46.

Judge Carroll ordered the DG to designate an attorney to represent Brillon within 14 days. *Id.* 252-53, 83; Pet. App. 22. The prosecutor noted that this order was similar to Judge Suntag's order at the November 26 hearing, and that the DG had either "ignored Judge Suntag's Order, or not complied with it in such a manner that made representation of Mr. Brillon possible. . . ." J.A. 249.

On January 15, the DG wrote Judge Carroll advising that Sleigh was assigned to the case:

> On November 26, 2002, we were notified by the court of the need for assignment of counsel in these matters. After conferring with the

> clerk on that day and the next day, we advised the clerk that these cases should be assigned to David Sleigh. . . . On December 2, 2002, we notified Mr. Sleigh that these cases would be assigned to him by the court. Apparently the Court never sent Mr. Sleigh notice of assignment prior to the status conference.

Id. 155-56. On January 22, the court issued a formal notice of assignment of David Sleigh. *Id.* 84-85.

F. January 22, 2003 to April 11, 2003.

May 2003 trial date. On February 19, an off-record status conference was held, at which Judge Suntag ordered Altieri and Donaldson to transfer files to Sleigh. *Id.* 25-26. Judge Suntag set a March 30 defense deadline for disclosure of witnesses and an April 30 deadline for defense motions and completion of discovery. *Id.* 26. He ordered the trial to be held "late May 2003[;] 2 days." *Id.*

Sleigh was in trial out of state from February 3 to February 21. *Id.* 1.7. On February 25, 2003, he filed a motion to extend the witness-list date from March 30 to April 11, and the discovery and motion deadline from April 30 to May 15. *Id.* He did not ask for a continuance of the "late May" trial. *Id.* The motion was granted "Per State Agreement" on March 17. *Id.* 27.

On April 10, Sleigh sent a letter to Brillon stating: "As a result of modifications to our firm's contract with the Defender General, we will not be representing you in your pending case. Lora Evans

of the Defendant General's office is working to secure new counsel for you." *Id.* 158.

On April 11 Sleigh filed notice of his withdrawal from the case. *Id.* 118; Pet. App. 22-23. The docket entries do not record any response to this notice by either the court or prosecutor. J.A. 27.

G. April 11, 2003 to August 4, 2003.

For the next four months, from Sleigh's April 11, 2003 notice of withdrawal until the first appearance of Attorney Kathleen Moore on August 11, 2003, Brillon was without counsel.

On April 21, Brillon filed a pro se motion to dismiss for lack of a prima facie case. *Id.* 119-23. On May 7 he filed a pro se motion to dismiss in the interest of justice, based in part on speedy trial right violations. *Id.* 124-35.

On May 13, the Judge ordered a hearing on Brillon's motions for July 21. *Id.* 28.

May passed without a recorded cancellation of the scheduled jury draw. *Id.* 27-28.

On June 20, Lora Evans of the DG's Office wrote to the court clerk advising that "[w]e have received authorization and funding from the legislature" for a new "serious felony unit" and that Attorney Kathleen Moore would be hired for that position on August 1, 2003, after which she would be able to accept assignment to the case. *Id.* 159-60.

The docket records no activity in June. *Id.* 28

On July 21, the scheduled motion hearing was continued until August 11. *Id.* No other activity took place in July. *Id.*

H. August 4, 2003 to June 14, 2004.

On August 1, Moore was assigned by the Court. *Id.*

On August 11, Moore appeared at a status conference but said nothing. Aug. 11, 2003 Tr. Judge Suntag ordered another status conference in 30 days, in order to allow Moore and Brillon time to talk and Moore "a chance to come up-to-speed." *Id.* 2, 4, 6. Brillon objected to the delay. *Id.* 5-6.

At the status conference on September 8, Moore noted her need to make sense of the file and to track down depositions and other documents. She asked the prosecutor to provide her a list of the State's witnesses, with addresses, so she could interview them. Sept. 8, 2003 Tr. 10-11.

At the judge's suggestion, counsel agreed that whatever motions had been filed by predecessor counsel would be deemed withdrawn. *Id.* 13-14. The judge asked Moore to suggest a motions deadline. Moore replied that it depended in part on when she received the witness list and deposition transcripts. *Id.* 14-16.

The order was:

> All pending defense motions are withdrawn. State and defense advise Court by 11-7-03 as to which motions remain active.

J.A. 29. Responses to the new or refiled motions were due by November 21, 2003. "Everything filed is withdrawn and you have 60 days to file anything." Sept. 8, 2003 Tr. 15-16.

The next status conference was initially scheduled for November 17. J.A. 29.

On October 27 the November 17 status conference was advanced to November 3. *Id.*

On October 28 the November 3 status conference was rescheduled for December 8. *Id.* 29-30.

On November 3, Moore filed a request to extend the motions deadline until December 8, noting that the November 17 status conference had been continued "due to the unavailability of the Court" on that date. *Id.* 138. She represented that she still had not received deposition transcripts from predecessor counsel, and that Ammons was unavailable for consultation, having been on extended leave. The prosecutor agreed to the extension and Judge Suntag granted it the same day. *Id.* 30, 138.

The date "December 8, 2003" appears on the docket sheet with no accompanying notation. *Id.* 31. According to Moore, an off-record hearing was held that day, at which Moore stated that she had not received needed discovery from the state. She asked for and was granted another 60-day extension of the motion-filing deadline, and met with the prosecutor about needed discovery that same day. P.C. 95; J.A. 31.

On February 9, 2004, the State produced the last of outstanding discovery, with the exception of some photographs. P.C. 95.

On February 11, Moore moved for a third extension, also stipulated, representing that additional time was needed to complete the motions. *Id.*

On February 23, Moore filed a motion to dismiss for denial of a speedy trial and due process, and in the interests of justice.[7] *Id.* 96. The motion was denied by Judge Suntag in a written opinion dated April 19, 2004. Pet. App. 75.

On April 26, Moore filed a motion to compel production of the witness list, representing that the court had so ordered on December 8, 2003. J.A. 33-34, P.C. 124-25. In a separate motion she moved to compel production of the transcript and tape of a deposition which the State had taken of defense witness Roger Phillips in February 2002. J.A. 33.

June 14, 2004 Trial Date. At a hearing the same day the judge noted that "obviously" the witness list should have been provided in 2001. Apr. 26, 2004 Tr. 8. The court ordered the State to provide an updated witness list, and to notify the defense whether it had a tape or transcript of the Phillips deposition. (By the time of trial the transcript had been given to Moore. June 17, 2004 Tr. 5, 7-9.)

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[7] The docket entries mistakenly refer to this as a motion in limine. J.A. 31.

The defense asked for a trial date. The court ordered the case to be ready on June 14. J.A. 33.

On May 26, 2004, Moore filed a number of motions and other documents under Vermont's criminal procedure rules, including an opposition to the State's notice of intent to introduce evidence of a prior conviction, an opposition to the State's notice of intent to prove that Brillon had slashed the tires on Michelle's car, and a response to the State's motion to prevent the defense from questioning Michelle about drug use. The Court ruled on these matters on June 14.

On June 14, a jury was drawn. The trial began on June 15 and ended on June 17. Brillon was found guilty. *Id.* 38-39.

On March 23, 2005, Judge Suntag sentenced Brillon to 12-20 years. *Id.* 54.

I. The Appeal.

Brillon appealed to the Vermont Supreme Court, arguing that he had been denied his right to a speedy trial as guaranteed by ch. I, art. 10 and ch. II, § 28 of the Vermont Constitution, and by the sixth and fourteenth amendments to the United States Constitution. In particular, Brillon argued that the delays caused by a breakdown in the state's assignment-of-counsel system should be weighed against the state. In its brief, Vermont conceded that "the delay not attributable to the defendant, or to reasonable attorney preparation or court scheduling, extends from November 27, 200[2]

through July 31, 200[3], a period of eight months." J.A. 79.

The Vermont Supreme Court vacated the convictions and dismissed the charges. It held that, "[w]hen, as in this case, a defendant presses for, but is denied, a speedy trial because of the inaction of assigned counsel or a breakdown in the public defender system, the failure of the system to provide the defendant a constitutionally guaranteed speedy trial is attributable to the prosecution, and not defendant." Pet. App. 5. The Court based its conclusions on "the undisputed record in this case," which "includes the entire procedural history of this case – including the trial court's actions, the statements of withdrawing counsel, the periods of time defendant was without counsel, the period of time it took to bring defendant to trial, and the actions of the state's attorney and defendant." *Id.* 6-7. "The record reveals . . . that an unacceptable amount of the delay was not attributable to defendant, but to the system." *Id.* 7.

The Court reviewed the record in detail. It concluded that the first year of the delay, from July 2001 to June 2002, should not count against the State for various reasons, notwithstanding that Ammons withdrew because he was unready, and Altieri "did very little to move defendant's case forward during the several months he represented defendant . . . ." *Id.* 25. However, "most of the remaining two years can be and should be" weighed against the state. In this regard, the court noted the State's concession that the period between November

2002 and July 2003 – from Donaldson's withdrawal until Moore's assignment – should not count against Brillon. *Id.* 26.

The Court "recognize[d] that defendants may attempt to manipulate the system by creating delay that could conceivably support later speedy-trial claims," but found that "the record does not support the State's suggestion that this occurred here, and the district court made no such finding." *Id.* Indeed, the Court concluded from the record that Brillon's case was otherwise:

> [D]efendant's trial was delayed for several months, even years, because of the failure of several assigned counsel to do anything to move his case forward. As discussed above, defendant consistently requested that he be tried promptly. He sought the removal of his attorneys only after a significant period of time passed without them doing anything in his case.

Id. 29.

SUMMARY OF ARGUMENT

I. The Vermont Supreme Court correctly held that the pretrial delays caused by the failure in Vermont's assignment-of-counsel system should not be considered the defendant's responsibility under *Barker v. Wingo*, 407 U.S. 514 (1972). Because the state bears primary responsibility for assuring speedy trials, pretrial delays caused by the state's failure to provide constitutionally-required legal representation should be counted on the state's clock

under *Barker*, like other administrative failures, such as court congestion, understaffed prosecution offices, and negligence.

Vermont's failure to provide representation includes periods of only "pro forma" representation. Two lengthy delays in this case stemmed from the assignment of counsel who were inactive and did nothing to move the case to trial, whom the state and the court released from their duty of representation for contractual reasons. The Vermont court correctly attributed these delays to a failure of the DG's office and held the State responsible for them.

Indeed, Vermont conceded in the Vermont Supreme Court that two periods of non-representation and one period of pro forma representation in this case should be counted against the State. It should not be permitted to argue otherwise in this Court.

The decision below does not, as Vermont and its *amici* assert, convert public defenders into "government actors," and count their strategic delays against the state. The "government actor" in this case is not the lawyer in his representational capacity, but the agency responsible for assigning counsel in its administrative capacity. Respondent does not dispute that a state-assigned attorney's decisions regarding scheduling generally bind the client. Further, nothing in the opinion below suggests that continuances requested by assigned counsel should be counted against the state, as neither of Brillon's pro forma attorneys ever requested a continuance that affected the trial date.

Nothing in the opinion augurs an absurd double standard for assigned and retained counsel regarding continuances.

Moreover, Vermont's argument that Brillon would have been tried in February 2002 "but for" Ammons' withdrawal, and he is therefore "responsible" for the ensuing delays, misstates the law. This Court assigns responsibility under *Barker* by examining each period of pretrial delay and assessing its causes.

II. Delays caused by court congestion and negligence combined and overlapped with delays caused by the absence of legal representation. Trial was continued from February 2002 until September or October 2002, in part due to the press of other cases. Trial was not held in October, when Brillon was still nominally represented by Donaldson, for reasons that do not appear in the record. Another scheduled trial date in May 2003 also passed without comment in the docket. Attributing these delays to the State is a routine application of *Barker*.

III. Prosecutorial inaction and dilatory discovery after November 2002 extended the overall delay. The prosecutor had an independent duty to move the case forward but he took no action to do so despite being on notice of Brillon's lack of legal representation. In the later phases of the case, his months-long failure to provide defense counsel with discovery and a witness list necessitated further continuances, including two by consent.

IV. The Vermont court's weighing of the four *Barker* factors was based on the record facts and

properly informed by the court's institutional knowledge and legal responsibilities regarding Vermont's criminal court system. Its attribution of responsibility for the periods of delay was correct and its balancing was reasonable and entitled to deference.

ARGUMENT

I. PRETRIAL DELAYS CAUSED BY A FAILURE IN STATE'S ASSIGNMENT-OF COUNSEL-SYSTEM SHOULD NOT BE CONSIDERED THE DEFENDANT'S RESPONSIBILITY UNDER *BARKER V. WINGO*.

From June 2002 to August 2003, Brillon had no representation in any real or substantial sense, owing to a failure of the state's assignment-of-counsel systems. These delays, like other systemic delays, should be attributed to the State.

A. Delays Caused by a Breakdown in the State's Assignment-of-Counsel System, Like Delays Caused by Court Congestion and Negligence, Should Be Weighed Against the State.

1. The speedy trial rule announced in *Barker* "places the primary burden on the courts and the prosecutors to assure that cases are brought to trial." *Barker v. Wingo*, 407 U.S. 514, 529 (1972). "A defendant has no duty to bring himself to trial; the State has that duty . . . ." *Id.* at 527 (footnotes omitted). Practically speaking, a defendant also has no independent *ability* to bring himself to trial, because courts control their own calendars. ABA

Standards for Criminal Justice Standard 12-4.5 (3d ed. 2006).

Accordingly, the *Barker* Court held, delays caused by institutional failings, "such as negligence or overcrowded courts[,]" should be counted against the state, "since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." 407 U.S. at 531. The same is true, the Court added in *Strunk v. United States*, 412 U.S. 434 (1973), of delays caused by a prosecutor's office that "was understaffed due to insufficient appropriations and, consequently, was unable to provide an organization capable of dealing with the rising caseload . . . ." *Id.* at 436 (citing *Barker*, 407 U.S. at 531). As Justice White put it in his concurring opinion in *Barker*, "unreasonable delay in run-of-the-mill criminal cases cannot be justified by simply asserting that the public resources provided by the State's criminal-justice system are limited and that each case must await its turn." 407 U.S. at 538 (White, J., concurring).

2. It is axiomatic that the state is responsible for providing counsel for indigent defendants. *Barker*'s "duty of insuring that the trial is consistent with due process[,]" 407 U.S. at 527, includes the provision of legal representation. *Gideon v. Wainwright*, 372 U.S. 335 (1963), recognized the "obvious truth" that "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Id.* at 344.

Vermont exercises its duty under *Gideon* through a state-wide system of public defenders and assigned counsel, which operates in tandem with the state's courts. The substantive right of representation is guaranteed by statute.[8] The practical job of providing counsel is entrusted to a "defender general" with "the primary responsibility for providing needy persons with legal services" through state-employed public defenders, or private attorneys with whom the DG contracts. Vt. Stat. Ann. tit. 13, § 5253(a), (b).

The Vermont Supreme Court has imposed a parallel responsibility on trial court judges

> to assure the availability of counsel to all persons adjudged in need thereof, confronted by proceedings which may involve potential loss of personal liberty . . . .

Vt. Admin. Order No. 4, § 1. The court must notify the public defender "[i]n all cases where the right of a needy person to be represented by counsel exists, and is not waived . . . ." *Id.* § 3. It must assign other counsel when "the public defender is unable, due to a conflict of interest or otherwise, to represent the person in question" or where "the court, for good cause, determines the need for a replacement attorney in lieu of the public defender." *Id.* But the court's choice of "other counsel" is limited. The assignment must go to an attorney or firm under contract with the DG to provide assigned counsel

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[8] *See* Vt. Stat. Ann. tit. 13, §§ 5201(4), 5231; Vt. R. Crim. P. 44(a).

services, unless a conflict or other good cause requires a replacement, "in which case the court shall assign alternate counsel." *Id.*

3. A failure to provide legal representation which has the effect of delaying trial is the state's responsibility, not the defendant's. The conclusion has the force of syllogism. *Barker*, *Strunk* and *Doggett v. United States*, 505 U.S. 647, 657 (1992), charge the state with systemic and "negligent" delays, because they are the state's responsibility. *Gideon* and *Powell v. Alabama*, 287 U.S. 45 (1932), charge the state with a duty to provide legal representation for criminal defendants, and Vermont law closely involves the courts themselves in seeing that duty discharged. As the Vermont Supreme Court wrote in this case:

> The defender general's office is part of the criminal justice system, and ultimately it is the court's responsibility to assure that that system prosecutes defendants in a timely manner that comports with constitutional mandates.

Pet. App. 28.

This conclusion finds support in *Barker* itself, whose balancing test was intended to

> permit . . . a court to attach a different weight to a situation in which the defendant knowingly fails to object from a situation in which his attorney acquiesces in long delay without adequately informing his client, or

> from *a situation in which no counsel has been appointed.*

407 U.S. at 529 (emphasis added). The Solicitor General does not dispute the point. Amicus Br. of United States 27-28. If the Court's speedy-trial and right-to-counsel precedents are to coexist, no other conclusion is possible.

The violation is clearest when pretrial time passes with no assignment of counsel, as during the two months from November 26, 2002 when Paul Donaldson withdrew, to January 23, 2003 when David Sleigh was notified of his assignment, and the four months from April 11, 2003 after Sleigh filed his "notice of withdrawal" until August 11, 2003, when Kathleen Moore made her first appearance. These six months of the delay cannot fairly be charged to the defendant.

4. The failure to provide legal representation also extends to the time periods when Brillon was only nominally represented by two attorneys, Donaldson and Sleigh.

a. Legal representation means more than a lawyer's name on a case. There is no constitutionally significant difference between a failure to assign counsel and assignment of nominal or pro forma counsel. The Court recognized this in *Powell v. Alabama*, where counsel were informally "appointed" but the record compelled "the conclusion that during perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going

investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense . . . ." 287 U.S. at 57. Rather, "the appearance was rather pro forma than zealous and active . . . ." *Id.* at 58 (quotation omitted). "Under the circumstances disclosed," the Court wrote, "we hold that defendants were not accorded the right of counsel in any substantial sense." *Id.* The Court has not changed its opinion of pro forma counsel over the years. In *Evitts v. Lucey*, 469 U.S. 387, 396 (1985), the Court wrote that "nominal representation on an appeal as of right – like nominal representation at trial – does not suffice to render the proceedings constitutionally adequate." Indeed, nominal, non-functional counsel is no better than "no counsel at all." *Id.*

b. The periods when Brillon was represented by Donaldson and Sleigh should be attributed to the State because they are no different from the times when he had no lawyer all. There are two aspects to this equivalency. First, Donaldson's and Sleigh's activity – or, rather, inactivity – was essentially the same as "no counsel at all." Second, their inactivity, like the non-assignment of counsel, was not simply a failure of performance by the lawyers themselves, but was the result of decisions made and actions taken by the state's system for providing legal representation.

These attorneys' inactivity is not in dispute. The record shows missed deadlines, the absence of any filings or requests (other than requests for extensions), and withdrawal. The Vermont Supreme

Court found that Sleigh did "nothing" and Donaldson did "little or nothing." Pet. App. 27. The dissent agreed. *Id.* 45.

Equally important, their inactivity was the result of an external factor, a failing in the state's machinery for appointing counsel. This failure is an "external" factor in the same sense in which this Court has used that concept as part of the "cause" analysis in the law of procedural default:

> the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule.

Murray v. Carrier, 477 U.S. 478, 488 (1986).[9] This concept is analogous here because the second *Barker* factor serves a function much like that of the "cause" exception to the procedural default rule in federal habeas corpus practice – to determine whether the state or the defendant should bear the consequences when proceedings in a defendant's case have gone awry because of an attorney's actions or failures to act.

Here, the "external factor" that hampered Donaldson's and Sleigh's representation was Vermont's Office of the Defender General, in the exercise of its powers to appoint and replace counsel.

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[9] The Solicitor General has suggested the same analogy, arguing that "the [defendant] must 'bear the risk of attorney error.'" Amicus Br. of United States 21 (quoting *Murray*, 477 U.S. at 488)).

c. As authorized by statute,[10] the DG assigns "contract" counsel in cases that public defenders cannot handle because of conflicts. When this case was pending in the district court, this contract system was a matter of concern in the Vermont Legislature. In 2000, the legislature established an "indigent defense task force" to study "the structure and funding of the office of the defender general and ways to improve services to clients."[11] The task force's report, dated January, 2001, found significant shortcomings, but singled out contract lawyers as its main concern.

> The most troubling aspect of the assigned counsel contract conflict system is its current crisis-level inability to recruit and retain contractors throughout the state. About one-third of the assigned counsel contractors refuse to renew their contracts for the next year . . . The failure to recruit and retain attorneys in the state's contract program stems from a combination of inadequate compensation, uncontrolled caseloads, lack of supervision and support, and insufficient funding for investigative and other related support services.

Report of the Indigent Defense Task Force ("Report") 8-9 (2001).[12] Witnesses who testified before the task

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[10] Vt. Stat. Ann. tit. 13, §§ 5205, 5253(b).

[11] Act. No. 152 of the Acts of the 1999-2000 Session, § 56b.

[12] Counsel is requesting to lodge a copy of the report pursuant to Rule 32.3.

force "consistently identified the Assigned Counsel program as the 'weak link' in the present indigent defense delivery system." They stressed "[t]he frequent turnover of assigned counsel contractors because of lack of adequate compensation and benefits," and the assignment of "[i]nexperienced attorneys [who] are often required to handle complex and serious criminal cases beyond their capabilities." *Id.* at 9. The task force's first recommendation was the creation of "three regional serious crimes units" to handle cases where the public defender had a conflict of interest. *Id.* at 21.

In June 2001 the legislature authorized three two-person assigned counsel "serious felony" units for fiscal year 2002,[13] and in May 2002 it appropriated $81,667 for the three units.[14] On June 20, 2003, the DG's business manager reported to the Bennington court clerk that the legislature had authorized a fourth serious felony unit for fiscal year 2004. J.A. 159.

Once counsel has been assigned to a case, the DG has authority to replace counsel for "good cause," independently of the court. Vt. Stat. Ann. tit. 13, § 5274. This statutory grant is acknowledged in the Vermont Supreme Court's Administrative Order No. 4, which also gives the courts a corresponding power to replace counsel independently of the DG. Once

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[13] Act No. 63 (H. 485) of the Acts of the 2001-2002 Session, § 57(a) (approved June 16, 2001).

[14] Act No. 110 (H. 646) of the Acts of the 2001-2002 Session, § 33(a)(29) (effective May 23, 2002).

counsel is assigned, "the responsibility for the representation shall continue until . . . the attorney is relieved by (i) the Defender General, [*or*] (ii) the trial court making the appointment . . . ." *Id.* § 4(b)(i). Although Vermont Rule of Criminal Procedure 44.2(c) appears to provide otherwise – permitting withdrawals after a status conference only "for good cause shown and on such terms as the court may order" – in the present case the statute and the administrative order were allowed to trump the rule. Donaldson and Sleigh were both allowed off the case on the basis of their contractual status with the DG.

d. The DG assigned Donaldson to this life-imprisonment case knowing that Donaldson's contract would expire in three weeks. The contract was not renewed. The DG told Donaldson it would find a replacement. Donaldson and the DG discussed the matter for months, and eventually the DG found a replacement – an attorney who was about to give birth and would be unavailable for a time. When the court ratified Donaldson's departure, on contract grounds the DG nominated David Sleigh, a contract attorney in St. Johnsbury. The DG then failed to get Sleigh the necessary paperwork or formally assign him for two months. Soon after Sleigh had entered an appearance the DG modified its contract with him, relieving Sleigh of responsibility for Brillon's case, whereupon Sleigh also withdrew. The DG then allowed another four months to pass, with no attorney's name on the docket, before the new serious felony unit started operations and Brillon could be represented by

Moore. *See* J.A. 232-34, 238-40 (Donaldson); *id.* 24-26, 84-85, 118, 158, 243-45, 249-53 (Sleigh).

The Vermont Court properly held that the DG's office was a material "external" factor in Donaldson's and Sleigh's inactivity and the delays that inactivity consumed.

5. The State repeatedly asserts that the Vermont Supreme Court's decision was unprecedented. *See, e.g.*, Pet'r Br. 1 ("what appears to be a first in the history of American jurisprudence"); *id.* at 39 ("crossing a line no other court has dared to cross"). These assertions are unfounded. Decisions finding speedy trial violations where delays occurred because no representation or only nominal representation was provided to a defendant are commonplace.

In *Glover v. State*, 817 S.W.2d 409 (Ark. 1991), for example, defense counsel was granted permission to withdraw when he discovered a conflict of interest, leaving the defendant without counsel for two months until a new attorney was assigned. The prosecution argued that the counsel-less period should not count against the state for speedy trial purposes because Glover was free to proceed pro se. The Arkansas Supreme Court disagreed: "The effect of adopting such a position would be to force defendants to choose between their constitutional right to be represented by counsel and their constitutional right to have a speedy trial. . . . We refuse to adopt such a position." *Id.* at 410. Similarly, the defendant in *State v. Stock*, 147 P.3d 885 (N.M. Ct. App. 2006), remained in custody for three and one-half years, in part because his public

defenders, who were carrying a "humanly impossible" caseload of 200-300 cases, did essentially nothing to move the case forward during certain periods. *Id.* at 888. The court refused to weigh this time against the defendant. *Id.* at 891.

In *Isaac v. Perrin*, 659 F.2d 279 (1st Cir. 1981), there was again a delay between the withdrawal of the defendant's public defender and the assignment of new counsel. The First Circuit refused to charge this period to the defendant, considering it "similar to those caused by overcrowded courts," "which count[] against the state, but less heavily than intentional delay." *Id.* at 282-83. The same result followed in *Henderson v. State*, 662 S.E.2d 652 (Ga. Ct. App. 2008), where delays occurred because of a series of problems with the defendant's attorneys. (One attorney "never filed an appearance," others "needed time to prepare" for trial, and there was later "confusion as to who represented" defendant.) *Id.* at 654. The court held that "part of the delay may be attributed to the State's negligence" and that "this factor must be weighed as a relatively benign consideration against the State." *Id.* (internal quotation marks and alterations omitted); s*ee also United States v. Denson*, 668 F. Supp. 1531, 1533 & n.6 (S.D. Fla. 1987), *aff'd*, 859 F.2d 925 (11th Cir. 1988) (unpublished table decision); *People v. Johnson*, 606 P.2d 738, 747 (Cal. 1980).

Courts have also frequently found constitutional violations in cases of long-delayed appeals. Although *Barker*'s Sixth Amendment rule applies to trials, courts have held that its four-factor analysis

"provides an appropriate framework for evaluating whether a defendant's due process right to a timely direct criminal appeal has been violated." *Harris v. Champion*, 15 F.3d 1538, 1559 (10th Cir. 1994); *accord United States v. Thomas*, 167 F.3d 299, 303 (6th Cir. 1999); *United States v. Abou-Kassem*, 78 F.3d 161, 167 (5th Cir. 1996); *United States v. Rothrock*, 20 F.3d 709, 711-12 (7th Cir. 1994).

The Tenth Circuit ruled in *Harris* that lengthy delays in perfecting an appeal, caused by the public defender's backlog, should be attributed to the state, not the defendant.

> The State has offered no constitutionally sufficient justification for the delays, such as that the cases are unusually complex or that they involve the death penalty. The only reasons offered by the State were the lack of funding and, possibly, the mismanagement of resources by the Public Defender. Neither of these reasons constitutes an acceptable excuse for delay.

15 F.3d at 1562 (internal citation and footnote omitted); *see also Simmons v. Beyer*, 44 F.3d 1160, 1170 (3d Cir. 1995); *Muwwakkil v. Hoke*, 968 F.2d 284 (2d Cir. 1992); *Coe v. Thurman*, 922 F.2d 528, 531 (9th Cir. 1990); *Collins v. Rivera*, No. 99-CV-0490H, 1999 WL 1390244, at *4 (W.D.N.Y. Dec. 2, 1999); *United States v. Moreno*, 63 M.J. 129, 137 (C.A.A.F. 2006); *Gaines v. Manson*, 481 A.2d 1084, 1092-93 (Conn. 1984).

In addition to ignoring the significant precedent that undercuts its position, the State cites decisions

that have nothing to do with the facts of this case. *See* Pet'r Br. 30-34. These citations all relate to delays produced by the defendant himself or by dilatory actions by defense counsel. As the Solicitor General correctly argues, Amicus Br. of United States 15-23, it is logical that such delays should be attributed to the defendant. But it is also logical that delays resulting from the absence of counsel and from the assignment of nominal, non-functional counsel should be considered the state's responsibility. Not one of Vermont's cases is to the contrary.

B. Vermont Has Waived Its Argument That the Periods of Non-Representation and Nominal Representation from November 2002 to August 2003 Should Be Charged to the Defense.

Vermont's argument in this Court that all pretrial delays were Brillon's responsibility is an abrupt about-face from the position it took in the Vermont Supreme Court. Vermont's brief to that court acknowledged that the eight months between November 2002 and July 2003 – the period of Sleigh's tenure and the uncounselled periods on either side – "can not be attributed to the defendant . . . ." J.A. 78 (citing *Barker*, 407 U.S. at 531); *id.* 79. The Vermont court noted this concession, Pet. App. 26, while also counting the preceding months of Donaldson's tenure as a time when the defendant lacked representation in any real or substantial sense. Vermont's new claim constitutes sandbagging.

This Court has adamantly refused to consider contentions not raised in state courts on basic comity grounds and "a proper respect for state functions . . . ." *Webb v. Webb*, 451 U.S. 493, 499 (1981) (internal quotation marks omitted); *see Howell v. Mississippi*, 543 U.S. 440 (2005); *Cardinale v. Louisiana*, 394 U.S. 437 (1969). Vermont's argument to the Vermont Supreme Court led that court to decide Brillon's speedy trial claim on the premise that the eight months from November 2002 through July 2003 were not in contention. Based on that premise the Vermont court was not called upon to further justify counting those eight months against the State, or counting any similar period of pro forma representation (*e.g.*, Donaldson's tenure) against the State on the same basis.

Vermont now asks this Court to reverse the Vermont Supreme Court for having failed to justify a conclusion that Vermont told the court was not controversial. That tactic, if allowed here, would deprive the state court of its opportunity and responsibility to do the job that the federal system expects it to do in the first instance: interpret federal constitutional commands in the context of the specific controversy between the parties, the record, and relevant state law and practice. *See, e.g.*, *O'Sullivan v. Boerkel*, 526 U.S. 838, 844-845 (1999). This Court should not allow any party to do that to a state court. *See Illinois v. Gates*, 462 U.S. 213, 221 (1983).

C. The Decision below Does Not Convert Public Defenders into "State Actors," Invite Abuse, Or Create a Double Standard for Indigent Defendants' Counsel.

The parade of horribles suggested by Vermont and its *amici* – that the decision below converts public defenders into "government actors," that it encourages them to create strategic delays, and that counsel for indigent defendants will be held to a different standard than retained counsel – are baseless. These arguments are aimed at a straw man. The critical fourteen-month period of delay here is attributable to the DG and the court. Not a single trial continuance was requested by defense counsel during this period.

1. Vermont and its *amici* misread the Vermont court's decision as holding that public defenders and assigned counsel, because their services are paid for by the state, are "government actors," and that their conduct which delays a case *ipso facto* counts against the state for speedy trial purposes. *E.g.*, Amicus Br. of United States 24-26. From this misreading they spin out consequences that no reasonable court could tolerate – a regime in which defense continuances count against the state's speedy trial clock, unless the lawyer has been retained, in which case the time counts against the defense. The Vermont Supreme Court made no such holding.

The Vermont court held that *the DG's office*, the agency charged by state law with assigning and relieving counsel, was a "state actor," which must be held responsible for its part in the delays. There is a

clear distinction between the role of administrative actors such as the DG's office and the role of individual defense attorneys. Incontestably, public defenders represent their clients, not the state, and their representation of clients is not "state action." *Polk County v. Dodson*, 454 U.S. 312 (1981). This case, by contrast, concerns the non-assignment and nominal assignment of counsel by the state court and/or the responsible state agency, administrative actions that are ancillary to, and have essentially nothing to do with, attorney-client relationships or the actions of counsel as an advocate for his client. This Court in *Polk County* stressed this very difference "between administrative functions . . . and a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." 454 U.S. at 322 n.13. Conflating the two, as Vermont and its *amici* have done, "ignores the basic distinction that in the latter capacity a public defender is not acting on behalf of the State; he is the State's adversary." *Id.*

The Court's recent decision in *Rothgery v. Gillespie County*, 128 S. Ct. 2578 (2008), illustrates the proposition that the state's duty to provide representation for indigent defendants, and a lawyer's duty to provide effective representation, are horses of a different color. *Rothgery*, like *Polk County*, was a § 1983 action, in which a defendant claimed that the county violated his sixth amendment rights by refusing to *assign* him counsel after his initial court appearance. Neither the parties nor the Court questioned that the non-assignment was action (or inaction) "under color of state law."

The Vermont court never suggested that a lawyer acting as a public defender is an "arm of the state." Amicus Br. of Utah et al. 9. Rather, the court held that "the defender general's office is part of the criminal justice system and an arm of the state." Pet. App. 5. Vermont's statutes charge the DG with the responsibility for providing counsel. Vt. Stat. Ann. tit. 13, § 5253(a). In discharging this function the DG acts on behalf of the State; he is not the State's adversary. *Cf. Polk County*, 454 U.S. at 322 n.13.

2. Like Vermont's other *amici*, the Solicitor General focuses on counsel and their professional responsibilities, arguing that "the decisions of counsel are generally binding on the defendant." Amicus Br. of United States 21. As a general rule, and with the exception of cases where counsel renders "ineffective assistance," "when counsel seeks a delay, that delay is attributable to the defendant." *Id.* 23 (citing *New York v. Hill*, 528 U.S. 110, 115 (2000), and other cases where defense counsel sought or agreed to a continuance).

The Solicitor General's general rule has no application to this case. Although a lawyer's continuance motion generally speaks for and binds the client, neither Donaldson nor Sleigh made any "requests for delays" which postponed the trial date, with the possible exception of one month in 2002. Rather, the delays were the result of their inaction and subsequent withdrawals. Doing nothing is not a "decision," nor is it the same as "seeking" delay for litigation purposes. In the face of a client's demands

for a speedy trial, it is certainly not binding on the client.

The Solicitor General's caveat for "ineffective" lawyers raises problems that the Court need not decide in this case. Ineffective assistance, by definition, includes an element of prejudice, "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). This is necessarily an outcome-dependent retrospective test. By what standard should mid-course ineffectiveness be evaluated, when the outcome is still in the future? As a practical matter, how would a trial judge make a determination of the facts? What role would the prosecutor play? The Court found it unnecessary to enter this uncharted territory in *Rothgery*. 128 S. Ct. at 2592. It also need not do so here.

The rule we propose is narrower and more workable. The pretrial time taken up by an assigned lawyer who enters a case and then exits it, without having represented his client in any real or substantial sense, is chargeable to the state under *Barker*, to the extent that these delays are the product of external state influences, like the DG's office here. That is sufficient to decide this case.

3. Vermont's related argument, that the opinion below creates an incentive for strategic delay and establishes a double standard for continuances sought by assigned and retained counsel, rests on the same misreading of the court's holding and the record. Vermont paints a dire and fantastic picture.

If the decision below is upheld, "only delays by private counsel get charged against the defendant . . . ." Pet'r Br. 36. This absurdity even extends to intentional delays. *Id.* 37-38.

The Vermont Supreme Court made no such holding, as explained above. The argument that it did – that it believed publicly funded lawyers were "government actors" whose requests for continuances were government requests, chargeable to the state – is the absurd endpoint of fanciful extrapolation from a false premise.

Vermont's brief not only misconstrues the holding below; it ignores the record. *None* of the trial delays during the fourteen months from June 2002 to August 2003 were the result of a continuance. In August 2002 the judge asked Donaldson how much time he needed to be ready. Donaldson asked for two months, and the judge put the case on the jury list for October 2002. But a previous scheduling decision during Altieri's tenure had slated the trial for September 2002 at the earliest, so Donaldson's request extended the pretrial time for a month at most – or rather it would have, if the October jury draw had not been cancelled. Given that unexplained cancellation (discussed in Point II, *infra*), and Donaldson's withdrawal from the case in late November, even this putative month had no effect on the trial date.

After Sleigh was assigned in January 2003, the judge scheduled a new trial date for "late May" 2003. Sleigh asked for an extension of motion and discovery deadlines, but *not* a continuance of the

trial. Rather, he withdrew from the case in April. And there can be no claim that defense-requested continuances had anything to do with the total of six months before and after Sleigh, because nobody was there to ask for one.

The only continuances that the Vermont Supreme Court arguably counted on the State's clock came at the end of the pretrial period, when Brillon had already been waiting for trial for more than two years. "Despite the already significant delay," the court wrote, "the prosecution stipulated to several more continuances before a trial was finally held in June 2004." Pet. App. 27. But nothing suggests that the court's disapproval stemmed from Brillon's attorney's court-assigned status, or that the court would have taken a different view had she been retained. Instead, the court pointed to the already-accumulated delay and the prosecutor's acquiescence in further delay. In Point III, *infra*, we argue that these late continuances were also the product of the prosecution's dilatory discovery.

Nothing in the decision below gives assigned counsel an incentive to delay. Vermont's further claim that the decision gives the *defender general* a motive to delay cases verges on the ridiculous. Vermont's assignment-of-counsel agency, the State argues, "has every incentive to win the freedom of the defendants who are represented." Pet'r Br. 33. Defendants represented by assigned counsel should not "walk away unpunished because of delays caused by the Defender General, when the Defender General is trying to obtain that very result," and the DG "will

now have every motive to delay assigning counsel." Pet'r Br. 33-34. However, the DG has responsibility for providing counsel, not acting as counsel. Vt. Stat. Ann. tit. 13, § 5253(a). It is not the State's adversary. The notion that it would intentionally violate its duty in order to obtain that rarest of outcomes, a speedy trial dismissal, is frivolous.

D. Vermont's Claim That Brillon Was "Gaming" the System, Wanted Delay, and "Fired" His Lawyers As a Means to That End, Misrepresents the Record and Disregards the Vermont Court's Contrary Findings.

Vermont's insistence, seconded by *amicus* Vermont Network Against Domestic and Sexual Violence et al. ("VNADASV"), that Brillon secretly wanted delay and achieved it by "firing" his lawyers, is no less fantastical for its repetition. Vermont ignores the utter lack of record support for this devil-theory of the case, which, as explained in the statement of the case, *supra* 3-6, flies in the face of the Vermont Supreme Court's record-based findings. While the Vermont court held Brillon responsible for early delays caused by the withdrawal of Ammons and Altieri, nothing supports a finding that he secretly wanted these delays.

Ammons. Brillon by telephone heard Ammons plead for a continuance on the eve of Brillon's scheduled trial. Brillon heard Ammons tell the court that his office was in disarray, that he was carrying an impossible caseload, and that he was unprepared for trial. Attorneys in such straits, whose "continued representation in previously accepted cases will lead

to the furnishing of representation lacking in quality or to the breach of professional obligations," must "take such steps as may be appropriate to reduce their pending or projected caseloads . . . ." ABA Standards for Criminal Justice: Providing Defense Services Standard 5-5.3 (3d ed. 1992). Even Vermont's *amici* concede as much. Amicus Br. of Utah et al. 7; Amicus Br. of NAG et al. 12 n.8.

However, the issue is not whether Ammons had a right or duty to withdraw, but whether he had an ulterior motive for doing so: to delay the trial so that Brillon's case would be reassigned to a different judge, Pet'r Br. 10-12, or to torment Michelle, by dragging out the proceedings. Amicus Br. of VNADASV 7, 13, 18, 24. The Vermont Supreme Court, taking care to specify its authority to review the record *de novo*, Pet. App. 11-12, concluded that Ammons withdrew "because of [his] failure to be ready for trial, not because of defendant's actions." *Id.* 25. Brillon grudgingly consented, because it was apparent that Ammons, by admission, was "not prepared to go forward with a trial." *Id.* 30. These findings, on this record, are entitled to deference. *Cf. Doggett*, 505 U.S. at 652-54 (declining to revisit findings of primary fact by trial and appellate courts regarding government's negligence and defendant's ignorance of pending charge).

Altieri. Brillon's request for a replacement for Ammons was reasonable, given what Ammons told the court about his unreadiness. His angry threat to Altieri was not, and though Vermont overplays the

incident,[15] we do not disagree that Brillon's misconduct forced Altieri's withdrawal. But the claim that his motive was to delay the trial is pure speculation, and his conduct, regardless of motivation, did not actually *produce* any delay. Donaldson was appointed the same day (June 11, 2002) and trial was not scheduled until September or October, because of court congestion.

The case stands in contrast with *Barker*, where the record did show that the defendant "did not want a speedy trial" because he was hoping for the acquittal of a codefendant. For more than three years "the record shows no action whatever . . . that could be construed as the assertion of the speedy trial right," 407 U.S. at 534, and Barker's counsel conceded that Barker did not want to be tried. Vermont's assertion that Brillon wanted delay is grounded in speculation, not the record.

Donaldson and Sleigh. Brillon asked for a replacement for Donaldson because Donaldson had done nothing to prepare the case. The court let Donaldson withdraw because his contract had expired. As for Sleigh, the firing went the other way: Sleigh fired Brillon. In both cases the court must share responsibility – for permitting Donaldson to withdraw, and acquiescing in Sleigh's withdrawal.

Brillon simply did not have *control* during this process. The *amicus* brief of VNADASV asserts that "the only person who seemed to be in control of the court proceedings during the first two years was

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[15] Brillon denied that he threatened Altieri's life.

Brillon himself." Amicus Br. of VNADASV 21. Vermont's brief assumes the same, with its claims that Brillon manipulated his lawyers and "fired" them when they would not do his bidding, all for the purpose of delay. *E.g.* Pet'r Br. 27. To the extent that these are factual assertions, the court below found them erroneous: "[T]he trial court, the state's attorney's office, and the defender general's office" were not merely "passive players helpless to prevent defendant's 'monkey-wrenching' 'maneuvers.'" Pet. App. 6 (quoting dissent, *id.* 39, 44). As a legal matter, Vermont and its *amici* are also wrong. Unlike the client of retained counsel, Brillon had no right to "fire" his lawyers. *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006). The decision to replace assigned counsel is in the discretion of the court, *Morris v. Slappy*, 461 U.S. 1 (1983), or, pursuant to Vermont's statutes and Administrative Order 4, the DG.

E. Vermont's "But For" Argument.

1. Finally, Vermont argues that *but for* Brillon's "firing" of Ammons, Brillon would have been tried within seven months of arraignment, so all the subsequent delays must be counted on Brillon's clock. Aside from the fact that Brillon acted reasonably in requesting a substitute, this Court's precedents give no support for Vermont's method of time-keeping.

For example, the Court wrote in *United States v. Loud Hawk*, 474 U.S. 302 (1986), that delay caused by the defendant's interlocutory appeal would not count against the government, unless the defendant

could show "an unreasonable delay caused by the prosecution in that appeal, or a wholly unjustifiable delay by the appellate court." *Id.* at 316. But these latter delays would not have happened "but for" the appeal. In *United States v. Taylor*, 487 U.S. 326 (1988), the defendant failed to appear at trial, and after his re-arrest months later a "lackadaisical" prosecution delayed his trial beyond the 70-day limit of the Speedy Trial Act, 18 U.S.C. § 3162. The Court acknowledged that the act had been violated, even though the violation would not have occurred "but for" the defendant's failure to appear.

Similarly here, even though Brillon can be held responsible for Ammons' withdrawal and for a reasonable period thereafter to allow a replacement attorney to come up to speed – periods which the Vermont Supreme Court *did* charge against Brillon – the trial court is nevertheless responsible for most of the ensuing seven- or eight-month continuance that the prosecutor explained was a result of court congestion (*see* Point II, *infra*). It is simply not the case that an initial delay caused by a defendant immunizes the prosecution against all subsequent delays for which it is responsible. Under *Barker*, the defendant's penalty for giving rise to a delay is only that this period is counted against him – not that all future state- or court-caused delays are forgiven.

2. A variant on this "but for" argument is Vermont's suggestion that by "firing" his lawyers Brillon exhausted the supply of lawyers, given the "paucity" of criminal lawyers in Vermont. Pet'r Br. 29. Vermont portrays the falling-off of lawyers in

this case as a "sabotage" for which Brillon stands responsible. It stresses that he had six lawyers in all. The correct number is *seven*: Wood, Ammons, Harnett, Altieri, Donaldson, Sleigh, and Moore. However, Brillon bears, or shares, responsibility for the withdrawals of only the first two, Ammons and Altieri.[16] Any depletion of the lawyer pool came after the withdrawals of Donaldson and Sleigh, for which Brillon bears no responsibility.

There may well have been a depleted supply of *contracted* lawyers at this time,[17] but it was not Brillon's doing. The 2001 Report of the Indigent Defense Task Force flagged the DG's "crisis-level inability to recruit and retain contractors." *Supra* 36. The conditions described in the report are mirrored in this record and account for the repeated dysfunctional assignments and long-delayed reassignments of counsel for Brillon. To the extent that these resulted from a shortage of contract lawyers, that problem was systemic, a failure of the state.[18]

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[16] Aside from Donaldson, Sleigh, and Moore, Wood appeared only for arraignment and Harnett withdrew after a day or two because of a conflict.

[17] Even if there were, nothing indicates that there were not plenty of lawyers who could be assigned under Administrative Order No. 4, §§ 3, 6(a).

[18] Delays like the two months when Brillon was wholly without counsel between the designation of Sleigh and the time when Sleigh was given notice of his assignment were the result of pure negligence, not any shortage of attorneys.

II. ADDITIONAL AND CONCURRENT DELAYS WERE CAUSED BY COURT CONGESTION AND NEGLIGENCE, DELAYS WHICH COMBINED WITH AND OVERLAPPED THOSE ASSOCIATED WITH THE ABSENCE OF LEGAL REPRESENTATION.

During the period from June 2002 to August 2003, aside from the delays caused by the breakdown in the court's assignment-of-counsel process, the trial date was independently delayed by scheduling decisions by the court clerk's office. Attributing these delays to the state is routine under *Barker*, 407 U.S. at 531.

February to November 2002. After Ammons withdrew, the date of trial was continued from February 25, 2002 until October 2002, seven months, because of "the backlog related to other cases and specifically other 60-day cases" and because Brillon "had the trial dates reserved and he did not use them." J.A. 221.

For a reason which the record does not explain, the court cancelled the October trial date a month before Donaldson was allowed to withdraw. The cancellation itself was not entered on the docket, and it is impossible to guess why, or by whom, it came about, but the trial never happened.

May to August 2003. No new date was set from November 2002 to February 19, 2003, a period which coincided with, but extended beyond, the first period of total non-representation. At an off-record status conference, the judge set the trial for late May 2003. Sleigh withdrew in early April. May 2003 passed

without any notation about cancellation or rescheduling of the trial date, after which Brillon was again without counsel until August 2003. The record for May 2003 is as blank as it is for October 2002, but the silent cancellation of the May draw coincides with the court's silent acquiescence in Sleigh's withdrawal. The delay from the cancelled May jury draw until Moore's assignment in August should be charged to the court.

In cases such as this, where the record does not explain an event, courts attribute the resulting delay to the state. *Barker* speaks of "delay which is presumptively prejudicial," 407 U.S. at 530, and it directs courts to consider "the reason the government assigns to justify the delay." *Id.* at 531. As Professor LaFave puts it:

> The reference to "the reason the government assigns" indicates that the burden is on the government . . . . And when the government simply offers no explanation at all, it has been held that the court "can presume neither a deliberate attempt to hamper the defense nor a valid reason for the delay."

5 Wayne R. Lafave, et al, *Criminal Procedure* § 8.2(c), at 122 & nn.28-31 (3d ed. 2007) (quoting *United States v. Mancino*, 486 F.2d 750, 753 (7th Cir. 1973)). *Accord Jackson v. Ray*, 390 F.3d 1254, 1262 (10th Cir. 2004); *United States v. Cardona*, 302 F.3d 494 (5th Cir. 2002).

III. PROSECUTORIAL INACTION AND DILATORY DISCOVERY AFTER NOVEMBER 2002 CONTRIBUTED TO AND EXTENDED THE OVERALL DELAY.

While in the early stages of the case the prosecutor pressed for an early trial, moving for a date in February and opposing Ammons' requests for a continuance and to withdraw, the prosecutor's behavior was passive and dilatory after Donaldson withdrew in November 2002. For the next year and a half the record shows only inaction, acquiescence, and negligent or deliberate obstruction by the prosecution.

When Donaldson's withdrawal left Brillon without counsel, the prosecutor took no action. When Sleigh peremptorily withdrew from the case the prosecutor made no objection, and nothing indicates any effort on his part to address Brillon's lack of representation before or after Sleigh's withdrawal. The prosecution shares with the court the "primary burden" to bring its accusation to trial, *Barker*, 407 U.S. at 529, and it did not lift a finger during this period.

After Moore's assignment in August, the prosecutor's discovery delays necessitated a string of continuances from September 2003 until late April 2004. At a status conference on September 8, the court set deadlines for pretrial motions. Moore noted her need for additional discovery, including deposition transcripts and a witness list with addresses. She asked that the deadline be put off until after she received these documents, and the

judge gave her 60 days to file motions. In November, the prosecutor consented to a one-month extension. By December 8, the prosecutor still had not provided the witness list or other outstanding discovery, and Moore asked for a second 60-day extension. On the same date Moore and the prosecutor met and identified items the defense needed. Even so, some discovery was not produced until February 9, 2004, and Moore asked for an additional 60 days, to which the prosecutor again consented. As late as April 26, 2003, seven months after Moore's first request, the prosecutor still had not produced the witness list. Moore filed a motion to compel him to do so, and the judge gave him two more weeks to produce the list. *Supra* 21-24.

It is true that not all of these seven months are chargeable to the state, but a significant portion is. Two months were taken up by the court's decision on Brillon's motion to dismiss for lack of a speedy trial (filed February 23, denied April 19) and presumably some time was necessary for defense preparation. These periods were justifiable under *Barker*.[19] But with those exceptions most of the rest of the delay during this seven-month period stems from the prosecutor's dilatory discovery.

Government "lethargy" and indifference count on the state's clock, *Doggett*, 505 U.S. at 653, and "lethargy" describes the final seven months of the

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[19] During part of the period a motion to have Brillon transported to a prison nearer the place of trial was pending but the court never acted on it (filed Oct. 22, "rendered moot" on Nov. 14). J.A. 31.

pretrial period here. The Vermont Supreme Court's opinion does not specify what part of this time it weighed against the state, and the record does not permit any exact calculation. After summarizing the facts, Pet. App. 23-24, the court simply observed that "[d]espite the already significant delay, the prosecution stipulated to several more continuances before a trial was finally held in June 2004." *Id.* at 27. If this was a holding that not all of this final delay was the defendant's fault, the holding should be affirmed as an ordinary application of *Barker*.

IV. THE VERMONT COURT REASONABLY BALANCED THE FOUR *BARKER* FACTORS.

Barker's test identifies the relevant considerations but it announces no rule dictating how the balance should be struck. "A balancing test necessarily compels courts to approach speedy trial cases on an ad hoc basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right." 407 U.S. at 530. Like other ad hoc determinations, and because it is "impossible to determine with precision when the right has been denied," *id.* at 521, judicial review of the balancing process is necessarily deferential and circumspect. *See United States v. Williams*, 372 F.3d 96, 113 (2d Cir. 2004) ("We review the District Court's balancing for abuse of discretion"); *State v. Conrad*, 663 P.2d 1101, 1102 (Idaho 1983) (*Barker* balancing "necessarily rests within the sound discretion of the court based

on the circumstances of the case in which the conduct of both the prosecution and defendant are weighed."). *Cf. Taylor*, 487 U.S. at 337 (in weighing speedy trial act criteria "the district court's judgment of how opposing considerations balance should not lightly be disturbed").

This is especially true of cases coming to this Court from state courts. The speedy trial right serves institutional goals. *Barker*, 407 U.S. at 519. The institution at issue here is Vermont's criminal court system, for which the Vermont Supreme Court bears constitutional responsibility.[20] The Vermont Supreme Court must monitor the system's functioning and labor to correct its malfunctioning. That court knows the problems its state judiciary faces and, if the judiciary's control over those problems is limited, the Vermont Supreme Court knows where the administrative, fiscal and political solutions are to be sought.

Much, though not all, of the three-year delay in this case was rooted in the disorganization of Vermont's system of contract counsel, poor oversight of that system by the DG's office, and the trial court's failure to discharge its independent responsibility for assuring that the problems of the contract-counsel system did not deprive Brillon of responsible representation. Those problems had been a principal subject of the report and recommendations of the Indigent Defense Task Force, two members of which

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[20] Vt. Const., ch. II, § 30.

were appointed by the Vermont Supreme Court,[21] chaired by the court's recently retired chief justice. Shoestring funding of Vermont's public defense system has been an ongoing concern, and the court was certainly aware of the task force findings and recommendations, including the recommendation to augment the assigned counsel contract system with the addition of "regional serious crimes units." Brillon had to wait until August, 2003, until one of those "units," in the person of Kathleen Moore, was assigned. The task force had also recommended an increased public defender budget to keep up with increased costs, Report at 21, and the Vermont Supreme Court in deciding Brillon's case found it appropriate to "encourage the Legislature to examine any unfulfilled needs and address the problem." Pet. App. 38-39.

The Vermont court's conclusion that significant portions of the pretrial delay in this case were the fault of the system and were not chargeable to Brillon was a knowledgeable and correct judgment. Pursuant to *Barker*, the court did not weigh these delays heavily, but the weight it did give them was informed by its local knowledge and concerns. Its resolutions of the other *Barker* criteria – the presumptively prejudicial length of the delay, *id.* 13-15, the defendant's consistent assertions of his right, *id.* 29-30, and the prejudice, *id.* 31-37 – all stand unchallenged. Its balancing of the factors was fully consistent with *Barker*.

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[21] Act No. 152, *supra*.

CONCLUSION

The Vermont Supreme Court correctly held that a substantial part of the egregious delay in this case could not be attributed to the defendant. Fourteen months of nonexistent or nominal representation from June 2002 to August 2003 were the State's responsibility. Trial dates were pushed back by calendaring decisions made *sua sponte*, not by defense-requested continuances. These decisions included a postponement from February 2002 to September 2002 (at the earliest) in part for court-backlog reasons, the tacit disregard of an October 2002 trial setting, and the equally silent vanishing of a May 2003 trial setting after Sleigh withdrew because his contract with the DG had been changed. These overlapping delays are the court's responsibility under settled law. Finally, the prosecutor, by his inaction, shares responsibility for the six months when Brillon lacked counsel altogether (November 2002 to January 2003 and April to August 2003), and months of dilatory discovery after Moore entered the case (September 2003 to April 2004).

The judgment of the Vermont Supreme Court should therefore be affirmed.

Respectfully submitted,

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REPLY BRIEF

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In the Supreme Court of the United States

STATE OF VERMONT,
Petitioner,

v.

MICHAEL BRILLON,
Respondent.

On Writ of Certiorari to the Vermont Supreme Court

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

This case involves important legal questions, which the State will address below, but at its core rests a simple issue of justice: whether it is just to let a violent man, convicted of domestic assault as a habitual offender, walk free when he delayed his own trial by firing his first lawyer the day before trial, caused further delays by threatening the life of his third lawyer (forcing a withdrawal after the lawyer initially declined to withdraw), and then caused still further delays by firing yet another lawyer. Whatever delays occurred afterward, whether they were due to administrative delays or ineffective counsel, surely would never have occurred had Brillon not engaged in heinous conduct (threatening his counsel) or repeated bad conduct (firing three lawyers). Justice requires that Brillon suffer the consequences of his actions rather than the State, Brillon's victim, or the community at large – all of whom had no control over the delays. Simply stated, it would be a perversion of justice to allow a man who threatened the life of his lawyer to walk free because his trial was later delayed due to difficulties in getting or maintaining replacement assigned counsel to represent him. Indeed, such a ruling would send a dangerous message to violent defendants like Brillon, who are already predisposed to use violence to get what they want. In this case, if the Vermont Supreme Court ruling is left to stand, Brillon will have succeeded in using violence, rather than the jury trial process, to win his freedom.

Any thorough legal analysis clearly supports the same result that justice requires. The purpose of

the speedy trial right is to prevent *the government* from holding a citizen in jail for extended periods of time without a trial; not for self-inflicted delays caused by the defendant or his counsel. When a defendant intentionally and knowingly takes actions that delay his trial, he should not be permitted to plead for pity from the court because of other delays. When defense counsel delays the case by seeking continuances, or even – for the sake of argument – does "little or nothing" to represent the client, those delays cannot reasonably be attributed to the State. As discussed below, publicly-retained lawyers are not state actors, and therefore, their actions cannot give rise to a constitutional violation. Furthermore, if delays caused by public defenders and assigned counsel are attributable to the State for speedy trial analysis, the result will be a two-tiered system of criminal justice: one for the indigent, and one for those who can afford a lawyer.

While Brillon attempts to suggest that there are significant issues of fact, he admits all that is necessary for this Court to decide this case as a matter of law. He admits that he fired three lawyers, and that his last three lawyers all obtained continuances. Clearly, on this record, it is beyond dispute that all but four or six months of the delay was caused by Brillon and his counsel. The remaining time, when Brillon was without counsel, was, at most, a neutral factor which should not be weighed against the State.

Although this Court need not review the record to decide the case, it is clear that Brillon grossly misrepresents the record. Moreover, the

amici's argument that this Court should not review the findings of a state court, has no validity where, as here, the state court never should have made findings to begin with because there was no basis in law to find that delays caused by publicly-retained counsel are charged against the state, and where the record was woefully incomplete because defense counsel were never permitted to explain their actions. In any event, the record does not support the Vermont Supreme Court's findings.

ARGUMENT

I. BRILLON WAIVED HIS SPEEDY TRIAL RIGHT, BOTH WITH HIS ACTIONS, AND WITH HIS CONSENT.

Brillon has admitted all of the facts that are necessary for this Court to decide the case as a matter of law. Brillon admits that he fired Ammons on the eve of trial, Resp't Br. at 10; that he threatened Altieri and forced his withdrawal, *id.* at 12-13; that he moved to dismiss Donaldson, *id.* at 14; and that the court dismissed Donaldson from the case, *id.* at 16. That alone is enough to decide this case, but there is more. Brillon admits that, during the two-year period that the Vermont Supreme Court wrongly charged to the State, *all* of his lawyers obtained continuances. He admits that Donaldson "asked for two months" to get ready for trial, *id.* at 48; that Sleigh, too, sought and received a continuance, *id.* at 19; and that Moore sought and received three continuances, *id.* at 22-23.

Brillon's actions bar his speedy trial claim, under both the balancing test and under the waiver doctrine set forth in *Barker v. Wingo*, 407 U.S. 514, 529 (1972). In discussing the waiver issue in *Barker*, the Court stated that, "We hardly need add that if delay is attributable to the defendant, then his waiver may be given effect under standard waiver doctrine...." Here, any balancing of Brillon's admitted delays tips the scales in the State's favor, but Brillon also clearly waived his right to a speedy trial, both by his actions and by his knowing acknowledgment on the record.

The judge explicitly told Brillon, back on August 5, 2002, that Brillon had waived his right to a speedy trial by firing Altieri:

> The Court went through with Mr. Brillon the – the weighing out of consequences at the time that he moved to have former counsel removed and one of the things that *I was very clear about was that he's – that – that as an inevitable accompaniment to his Motion he was waiving his right to have a speedy trial.* That does not mean that he – his case goes into limbo. It just means that we now bring this case to trial consistent with defense counsel's reasonable need, new defense counsel's reasonable need to conduct additional discovery . . . and to then with the other limiting factor, of course, is the Court's calendar, but *there is no particular time frame any longer within which we are*

> *required to get Mr. Brillon's case to trial.*

Id. at 5 (emphasis added). Neither Brillon nor Donaldson objected to this instruction. Clearly, Brillon knowingly waived his speedy trial right.

In sum, Brillon's admissions show that the overwhelming cause of the delay in this case was either Brillon's conduct, or his counsel's delays. It would be a terrible perversion of justice to let a defendant whose intentional actions repeatedly delayed his trial walk free because of delays that occurred afterward, or to hold the State responsible for delays caused by defense counsel – especially when Brillon expressly waived those rights.

II. DELAYS BY BRILLON'S COUNSEL CANNOT ARISE TO CONSTITUTIONAL VIOLATIONS BECAUSE DEFENSE LAWYERS ARE NOT STATE ACTORS.

Moreover, even if one assumes for the sake of argument that Brillon's conduct and waiver are not enough to require reversal of the Vermont Supreme Court decision, the Court should still reverse the decision because the delays caused by Brillon's counsel cannot constitute speedy trial violations as a matter of law.

Brillon concedes that, "Incontestably, public defenders represent their clients, not the state, and their representation of clients is not 'state action.'" Resp't Br. at 45, *citing Polk County v. Dodson*, 454 U.S. 312 (1981). That should be the end of the legal

analysis required, because only state actors can commit constitutional violations. There is no "state invasion," as this Court required when it first applied the Sixth Amendment to the states in *Gideon v. Wainwright*, 372 U.S. 335, 341 (1963) (holding that the "guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment"). Accordingly, any delays caused by Brillon's counsel cannot, as a matter of law, justify the relief granted here.

Indeed, it would create a mockery of our criminal justice system if publicly-funded lawyers could win freedom for their clients by seeking continuances, or worse, by doing absolutely nothing. The Vermont Supreme Court's ruling sends a disturbing message to assigned counsel that if they delay to the extreme or do nothing, they may actually benefit their client more than had they pursued the case diligently. As discussed at length below and also in the Solicitor General's Brief at 5-8, 23, the delays in the last two years of this case were all caused by Brillon's counsel. Not once did the prosecutor seek a continuance. And, although Brillon filed requests asking for a trial, not once did any of his counsel file a demand indicating that counsel was ready for trial, a common Vermont practice. *See*, Pet. App. 77-78.

Brillon's claim that the many requests for continuance filed by Brillon's lawyers in the last two years should be charged to the State because those

delays purportedly did not delay the trial date more than a month, *see* Resp't Br. at 48, is preposterous. Clearly, delays of any kind push back the trial date. Otherwise, this case would have been tried as initially planned in October of 2002 when Donaldson took over the case for Altieri. Instead, rather than pushing for a prompt trial at the status conference on August 5, 2002, Donaldson complained that he needed 60 days or longer just to interview the witnesses.[1] Tr. 8/5/02 at 6. Brillon then wrote a letter complaining about Donaldson, J.A. 153-54, and then moved to fire Donaldson on October 22, 2002, before the case could be scheduled for trial. J.A. 23. Then, Sleigh obtained a continuance, and Moore obtained three more.

Although Brillon purports to rely on *Powell v. Alabama*, 287 U.S. 45 (1932), *see* Resp't Brief 32-34, that case could not be more inapplicable. In *Powell*, 287 U.S. at 53, the court appointed "all the members of the bar" to represent three "negroes" charged in a capital case of rape, and the one lawyer who happened to show up defended all three in their trials (six days after indictment). Here, in contrast, the Defender General [herinafter DG] appointed new counsel for Brillon *the same day as his lawyers withdrew*, every time except the last time, and then the DG went to the legislature to get more funding. *See* Docket Entries dated 2/25/03 (J.A. 21); 3/1/02 (*id.*); 6/11/02 (*id.* at 23); 11/26/02 (*id.* at 24).

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[1] This is undoubtedly why the trial was not scheduled until October, not because of purported "court congestion" as Brillon claims. *See* Resp't Br. at 52.

Under the Vermont Supreme Court's ruling, the State is charged when Brillon's lawyers ask for a continuance, and the State is also charged when Brillon's lawyers work diligently and remain on the case (as Moore did). Indeed, *everything* is charged to the State, from the moment Brillon threatened Altieri (June 11, 2002) until the trial (June 15, 2005). This ruling cannot be justified. Even if the law permitted delays by an assigned counsel to constitute state action (which it clearly does not), it defies all logic and reason to attribute these defense counsel delays to the State.

Moreover, Brillon's claim that "decisions finding speedy trial violations where delays occurred because of no representation or only nominal representation ... are commonplace," Resp't Br. at 39-40, is flatly false. Despite his claim that such rulings are "commonplace," Brillon has only found six such purported cases, and these cases, in fact, hold the opposite:

- In *Henderson v. State*, 662 S.E.2d 652 (2008), the Georgia Court of Appeals *found that no speedy trial violation had occurred* despite the fact that there was a 68-month delay between defendant's arraignment and the trial. In a fact scenario which is much like Brillon's (but without the threat to counsel), Henderson repeatedly changed his counsel. The court rejected Henderson's claims that neither he nor his attorney caused any of the delays, and declared that, "the leaves of absence filed by Henderson's first attorney, the various changes in appointed counsel, and the

confusion caused by Henderson's effort to employ private counsel prolonged the proceedings." 662 S.E.2d at 654. Accordingly, the court found that even though "the State's negligence delayed the proceedings in this case, Henderson prolonged that delay," and that "the trial court was authorized to find that, despite its length, the delay did not violate Henderson's right to a speedy trial." 662 S.E.2d at 656. This Court should reach the same conclusion.

- In *United States v. Denson*, 668 F. Supp. 1531 (S.D. Fla. 1987), the court found that *there was no speedy trial violation* despite a delay of 40 months between the issuance of the indictment and arraignment. The court noted that the record did not contain "even a hint of bad faith on the government's part," and ruled in the government's favor, *id.* at 1535, concluding that:

> This Court does not condone the Government's explanation that this case "fell through the proverbial cracks." ... However, the Court will not "ignore the competing interests of the government." *See United States v. Mitchell*, 769 F.2d 1544, 1548 (11th Cir. 1985). Nor will this Court turn its back on society's interest in seeing that justice is served. Accordingly, upon careful consideration of all the factors outlined in *Barker* and its progeny,

> this Court concludes that the Defendant's right to speedy trial has not been violated under the circumstances.

Id. This Court should reach the same conclusion, and not "turn its back on society's interest in seeing that justice is served."

- While the Arkansas Supreme Court in *Glover v. State*, 817 S.W.2d 409 (Ark. 1991), found that a two-month period where the court failed to appoint counsel for a defendant after his first attorney withdrew due to a conflict would count against the state under the Arkansas speedy trial rule, the case is readily distinguishable from Brillon's case. In *Glover*, the defendant sought a dismissal pursuant to the Arkansas one-year speedy trial rule, and the State – having no defense whatsoever for any of the remaining time – sought to exclude the two-month period during which the court failed to appoint counsel. 817 S.W.2d at 410. The key issue of importance to the Arkansas Supreme Court was that "the petitioner in this case did nothing to cause his trial to be delayed." 817 S.W.2d at 410. In fact, this was so important that the court expressly distinguished two prior cases where the court found no speedy trial violation: *Williams v. State*, 627 S.W.2d 4 (Ark. 1982) and *Divanovich v. State*, 617 S.W.2d 345 (Ark. 1981). The court noted that the *Williams* case was different because "the delay was caused by Williams' refusal to cooperate with his

appointed counsel... and new counsel had to be appointed." *Glover*, 817 S.W.2d at 410. Clearly, even under the ruling in *Glover*, the State would not be held accountable for any delay, including the periods where Brillon had no counsel.

- Finally, in *Isaac v. Perrin*, 659 F.2d 279, 282-83 (1st Cir. 1981), the court of appeals affirmed the district court's decision that *there was no violation of defendant's speedy trial right,* even though the court found that there was a three-month delay in appointing counsel for defendant, and that that factor weighed against the state, but "less heavily than intentional delay." The Court of Appeals concluded that there was no speedy trial violation, because, among other things, the delay in assigning counsel was a "neutral" factor. *Id.* At most, this case suggests that, in a case where a defendant has done nothing wrong to cause a delay (unlike Brillon), the complete failure to appoint counsel is a neutral factor to be weighed against the government, but not heavily. Brillon's case, where he actively caused delays that set the later delays into motion, is readily distinguishable.[2]

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[2] The State previously addressed the remaining cases cited by Brillon, *State v. Stock*, 147 P.3d 885 (N.M. Ct. App. 2006) and *People v. Johnson*, 606 P.2d 738 (Cal. 1980). *See* Pet'r Br. at 35.

As for the appellate cases that Brillon and his *amici* cite, those cases are irrelevant. Upon information and belief, no court has ever vacated a conviction and barred a retrial due to delays on appeal. Indeed, the most a defendant can ever obtain from counsel delays on appeal is a reinstated appeal, a waiver of the habeas exhaustion requirement, or a new trial – a right, or course, which the State has been deprived of here. Moreover, appeals are fundamentally different because, once convicted, a defendant has no motivation to delay his appeal. In contrast, as this Court noted in *Barker*, 407 U.S. at 521, "Delay is not an uncommon defense tactic" at the trial stage. Finally, because the stakes for the State and the community are necessarily much greater in a speedy *trial* claim, the bar that the defendant must reach in a speedy *trial* case must be inherently higher.

In conclusion, there really is no case law in the history of American jurisprudence that supports Brillon's position. For the reasons discussed herein, it is easy to understand why that is the case.

III. THE PARADE OF HORRIBLES IS PROVEN BY BRILLON'S ARGUMENTS.

The State's argument that the ruling creates what Brillon denounces as a "parade of horribles" is proven true by Brillon's own Brief. Shockingly, Brillon proves the point by accusing the prosecutor of "acquiescence" in the delay by *merely consenting* to Moore's requests for continuance. *See* Resp't Br. at 49.

This case is a perfect example of why Brillon's rule would indeed be horrible. While Brillon finds fault with the State for merely agreeing to the continuances requested by Moore, describing that conduct as "acquiescence in further delay," Resp't Br. at 49, Brillon fails to advise the Court that Moore requested those continuances in order to allow her time to consult with her predecessor counsel and collect their files (*see* Motion to Extend Deadlines (11/3/03)), and because her "daughter and son-in-law were in a very serious auto accident in Massachusetts...." Stipulated Motion to Extend Filing Deadline, 5/24/04. Brillon and his *amici* ask this Court to find fault with a prosecutor who believed that a lawyer should not be forced to go to trial without case files, or that a lawyer who suffered a terrible family emergency should be permitted to attend to her daughter. And, indeed, to the extent that the Vermont Supreme Court had any criticism at all of the prosecution, the court appeared to criticize the prosecutor for merely agreeing to these continuances. *See* Vermont Supreme Court's ruling at Pet. App. 37 ("Despite the already significant delay, the prosecution stipulated to several more continuances before a trial was finally held in June 2004.")

Clearly, if there is *any possibility* that a prosecutor will be accused of delay by *merely agreeing* to continuances, prosecutors will no longer agree to requests for continuance by publicly-retained counsel. Indeed, it is difficult to imagine a more reasonable basis for a continuance than the reasons presented here – no files, and a child seriously injured in a car accident – and still, the

prosecutor has now been accused of "acquiescence in further delay" by merely consenting. The Vermont Supreme Court's ruling sends a dangerous message to prosecutors that, no matter how reasonable the request for delay, the prosecutor will be held accountable.

It is ludicrous for Brillon to suggest, *see* Resp't Br. at 49, that the Vermont Supreme Court would not treat this matter any differently if Brillon had retained private counsel. Clearly, the only basis for finding that the delays here created a speedy trial violation was the court's analysis that the State is responsible for the actions of publicly-retained lawyers. Indeed, the court expressly stated that:

> [W]e conclude that a significant portion of the delay in bringing defendant to trial must be attributed to the state, even though most of the delay was caused by the inability or unwillingness of assigned counsel to move the case forward. The defender general's office is part of the criminal justice system .... While some of the delay in this case certainly is attributable to defendant, a significant portion is attributable to the criminal just system provided by the state.

Pet. App. 27-28. Obviously, when a privately-retained lawyer causes a delay, there is no basis to claim that the delays are caused by the system provided by the state. Moreover, it is difficult to imagine a scenario more ridiculous than a rich

defendant who hires a lawyer to delay his proceedings, and then walks free because his lawyer caused delays. It is simply absurd to claim that the Vermont Supreme Court's ruling might apply to privately-retained counsel.

Indisputably, the Vermont Supreme Court's ruling creates two classes of defendants. Indigent defendants will be pushed to trial before their counsel is ready because prosecutors must now object to every continuance, because if they consent, it will be treated as though the prosecution requested the delay and the prosecutor will be accused of "acquiescence in further delay." Defendants who can afford counsel will continue to be permitted all the time they reasonably require to prepare. The "parade of horribles" is all too real, and is proven beyond dispute even within the confines of the facts of this case, where a prosecutor has now been criticized by the Vermont Supreme Court for agreeing to a continuance when the request was due to the fact that a publicly-retained counsel's child was seriously injured in a car accident. For all of the reasons explained at length in the State's Brief on the Merits at 36-39, this two-tiered system undermines the very purpose behind *Gideon*, 372 U.S. at 344 – that "every defendant stands equal before the law" – and cannot be permitted to stand.

IV. THE VERMONT SUPREME COURT'S FINDINGS ARE NOT ENTITLED TO DEFERENCE BECAUSE THEY WERE PREMISED ON A FAULTY LEGAL ANALYSIS, WERE MADE WITHOUT A COMPLETE RECORD, AND ARE NOT SUPPORTED BY THE RECORD.

While this Court can decide this case as a matter of law based solely on any one of the legal arguments set forth above, the Court can also reverse the Vermont Supreme Court based on a full review of the record. There is no basis to give deference to the findings by the Vermont Supreme Court for three separate reasons. First, the Vermont Supreme Court should never have made any findings because such findings were based on a faulty legal premise that delays caused by state-funded lawyers are attributable to the State. Second, the findings are not entitled to deference because they were made on an incomplete record, where defense counsel were never afforded the opportunity to defend their actions. Finally, the findings are not entitled to deference because they are not supported by the record.

First, the findings are not entitled to deference because they are premised on a faulty legal premise. For all of the reasons discussed above, it was wrong for the Vermont Supreme Court to hold the State accountable for delays by Brillon's defense counsel. The Vermont Supreme Court should never have made any findings at all other than the simple finding that, because Brillon and his counsel were responsible for the delays, there was no

speedy trial violation. The case, quite simply, should end there.

Second, the findings are not entitled to deference because they were made on an incomplete record, where defense counsel were not provided an opportunity to defend themselves. It is of course fundamental that a lawyer may testify in his defense, and even reveal privileged attorney client communications when necessary "to respond to allegations in any proceeding concerning the lawyer's representation of the client." *See, e.g.*, Vt. Rules of Prof'l Conduct R. 1.6 (c). The reason for this universal rule is that one cannot determine that counsel was ineffective merely because the client says so. Yet, the Vermont Supreme Court apparently concluded that attorneys Sleigh and Donaldson did "little or nothing" based on an empty record where neither lawyer was ever asked to defend himself. It is disturbing that the Vermont Supreme Court could reach its conclusion, and irreparably tarnish the lawyers' reputations, without affording them a fair hearing.

Finally, the Vermont Supreme Court's findings are not supported by the record. The court held the State accountable for every minute that passed after Brillon threatened Altieri on June 11, 2002 until the trial was held two years later. Pet. App. 27 (¶34). We will now discuss the factual errors in those findings, in the event that the Court deems it necessary to review them.

A. There Is No Basis to Charge The State for the Time Moore Spent on the Case (August 1, 2003 to June 15, 2004).

To begin with, there is no basis to charge the State for *any* of the time that Moore was on the case. She stayed until the end, and she worked diligently – including filing many motions. Although she obtained three continuances, she then promptly brought the case to trial. There simply is no basis to charge her nearly eleven-month period, from August 1, 2003 until June 15, 2003, against the State.

The Vermont Supreme Court charges all of this time to the State because, as best as the State can tell, the prosecutor "stipulated to several more continuances" during Moore's tenure, "[d]espite the already significant delay." Pet. App. 27 (¶34). This finding is very disturbing, not only because it is legally wrong to charge the State with delays caused entirely by defense counsel, but also because it sets up a two-tiered criminal justice system, as discussed, *supra*, at 12-15.

To overcome this obvious wrong, Brillon now attempts to argue something that even the Vermont Supreme Court refused to find – that the prosecutor *caused* these delays. As we discuss below, Brillon's new claim, that "the prosecutor's discovery delays necessitated a string of continuances from September 2003 until late April 2004," Resp't Br. at 58, is patently false.

First, it is clear that Moore's continuances had *nothing* to do with the prosecutor. For example, in

her Stipulated Request to Extend Motion Deadline filed on November 3, 2003, at J.A. 137, Moore claimed that she needed more time *solely* because of delays in receiving information and communicating with her *predecessor counsel*:

> By way of support for this request Counsel for Defendant states that she is still awaiting the transcript of the mistrial in one of the matters, and is awaiting additional deposition transcripts and case materials from prior counsel Gwen Harris[3] and Gerry Altieri. In addition, prior counsel Richard Ammons has just returned to work from an extended leave, and has been unavailable to consult with Counsel for Defendant in these matters.

Similarly, the prosecutor was not at fault for the serious car accident that befell Moore's daughter, causing the continuance in May. To claim that the prosecutor caused these delays is disingenuous.

Second, correspondence between Moore and the prosecutor shows that, on December 8, 2003, the prosecutor literally provided *open access to not only the file in this case, but also to his files in two other cases.* Six weeks later, on January 23, 2004, Moore wrote to the prosecutor that, upon review of her "notes from December 8, 2003, when I met with you in your office to review your files in Brillon and

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[3] Harris represented Brillon in another matter.

Vargas,"[4] she had a list of documents that she needed:

> My notes indicate that the documents we identified that I need include the affidavits of probable cause in dockets no. 509, 957 and 959. You gave me the medical records as well as a diagram from 957. My notes also indicate that you found the deposition of Stanley, and that you were going to copy it and send it to me. Finally, my notes indicate that you were going to send me copies of the photos of the vehicle and the truck, which I do not have.

Moore's request references three different cases, but all she needed in this case (docket number 957-7-01) was the affidavit of probable cause (which Brillon received at the time of his arraignment), the medical records and diagram (which she notes the prosecutor gave her at the December 8 meeting), and possibly some photographs of the car Brillon was in when he hit his victim.

The prosecutor promptly responded to her request on February 4, 2004, by producing the affidavit of probable cause, and requesting Moore's email address so he could email the photographs. *See* Letter from Brian K. Marthage to Kate Moore, dated February 4, 2004. Moore then filed her second

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[4] Pursuant to Rule 32.3, the State has submitted a letter requesting permission to lodge Moore's 1/23/04 letter and the prosecutor's 2/4/04 response.

motion for continuance, noting that she had received "items" from the State on Feburary 9 (but not explaining that the only item she received was the affidavit of probable cause, which she had first requested on January 23) and claiming that "additional time is necessary" to complete motions. *See* Stipulated Request to Extend Motion Deadline, 2/11/04. Clearly, the prosecutor's actions had nothing to do with this delay.

Third, Brillon's argument that the court had to compel discovery is another red herring. While Brillon falsely suggests that the prosecutor had failed, by April of 2004, to turn over a witness list, *see* Resp't Br. at 23 (claiming that on April 24, 2004 "the judge noted that 'obviously' the witness list should have been provided in 2001"), the witness list was turned over on August 8, 2001 – less than ten days after Brillon's arraignment.[5] Every witness who testified at trial was disclosed either on that list or at another time during Ammon's tenure, as he deposed all seven trial witnesses.[6] Brillon's claim that the court ordered the State to produce "a witness list," Resp't Br. at 58, misrepresents what happened. The court ordered the State to produce an "*updated* witness list with addresses," J.A. 33 (emphasis added), as Moore was having difficulty

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[5] Pursuant to Rule 32.3, the State respectfully requests permission to lodge the witness list (dated August 8, 2001).

[6] Six of the seven trial witnesses (Michelle Tatro, Clayton Knapp, Terry Tatro, Barbara Croft, Carol Prouty, and John Behan) are on the list. These six, along with the seventh trial witness (Dorothy Powers) were deposed prior to January 15, 2002. *See* Docket Entry for 1/16/02 at J.A. 18.

locating two witnesses. For the first witness, the trial court later found that "the State did not have an address" to provide. J.A. 66. For the second witness, Moore located the witness, and subpoenaed him for trial, but he refused to comply with the subpoena. *Id.* at 68. Both witnesses had been deposed long before, by Ammons. *See* J.A. 18. The only other thing the court ordered was for the State "to notify defense whether there is a tape or transcript of the depositions of witness Phillips." J.A. 33. Phillips was a *defense* witness, whose testimony was precluded at trial because all he had to offer was inadmissible hearsay. *See* Tr. 6/17/04 at 24-27. Moreover, Brillon's prior counsel had been at that deposition and could have obtained not only the recording, but a transcript if he had desired to do so.[7] Clearly, Brillon's claim that these matters delayed the trial is nonsense.

In light of all of the evidence of this three-year prosecution, it is extraordinary that the prosecutor never did a single thing wrong. This prosecutor bent over backward to accommodate new counsel on the case, *opened* all of his files, and promptly gave her everything she requested. Even the Vermont Supreme Court (which reviewed the limited record *de novo*) found nothing wrong with the prosecutor's conduct, other than, perhaps, the fact that the prosecutor "stipulated to several more continuances

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[7] It is the customary practice, to save costs, for counsel to make an audio recording of the depositions. If either of the parties desires a transcript of the deposition, the party wanting the transcript bears the responsibility of getting the tape transcribed.

before a trial was finally held" when Brillon was represented by Moore. Pet. App. 27.

B. There Is No Basis to Charge The State for the Time Donaldson Spent on the Case (June 11, 2002 to November 26, 2002).

In addition to the fact that Donaldson was not a state actor as a matter of law, there is no factual basis to charge the State for the time Donaldson spent on the case. Because Donaldson never had the opportunity to explain his actions, let alone defend them, the court relied on only a one-sided version of events from Brillon. It is pure speculation to conclude that Donaldson did little or nothing.

To begin with, it is certainly possible that Donaldson did all that the case required at that time, given that Ammons had taken twelve depositions (J.A. 18), and Altieri had filed a notice of self defense (J.A. 21). While Brillon claims that Donaldson missed deadlines by failing to disclose witnesses and failing to oppose the State's bad act evidence, Resp't Br. at 14, it is likely that the defense witnesses were previously disclosed, and Donaldson may have reasonably believed that he had no basis to object to the bad act evidence. Of course, since Donaldson has never been allowed to defend himself here, one can only speculate.

Moreover, the record shows that Donaldson got off to a diligent start. At the status conference on August 5, 2002, Donaldson discussed at length how he had met with Brillon and that Brillon

wanted him to interview witnesses that Brillon had suggested who were "pertinent, particularly to some issues of impeachment of the alleged victim ...." Tr. 8/5/2002 at 3, 6. Donaldson also made clear that he had reviewed the file which was "quite big," *id.* at 4, that all witnesses had been deposed, *id.* at 7, that previous counsel had filed a notice of self-defense and that there was no other "notice of relevance" to be filed, *id.* at 8, and that he did not foresee any additional motions that needed to be filed.[8] *Id.* Donaldson may have reasonably believed that the case was ready for trial, and that nothing more needed to be done.

While there is no record of whether Donaldson interviewed Brillon's witnesses, that may well be because behind-the-scenes work like that never makes it onto the court's docket. On this record, one can only speculate. Certainly, however, there is no basis for counting the period of Donaldson's representation against the State. The record shows that Donaldson worked diligently from June 11 through August 5, and he may have worked diligently up until the end. The mere possibility that Donaldson stopped working on August 5, with no support in the record for such a theory, hardly justifies letting Brillon walk free of his crime.

Finally, Brillon's claim that "The DG assigned Donaldson to this life-imprisonment case knowing that Donaldson's contract would expire in three

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[8] Although Moore filed several substantive pre-trial motions, including a motion to bifurcate and a motion in limine, they were all denied. *See* J.A. 38-39.

weeks," Resp't Br. at 38, is not supported by the record. There is no evidence that the DG *knew* that the contract would not be renewed. Indeed, as demonstrated in the Report of the Indigent Defense Task Force that Brillon cites, it was generally the lawyer who refused to renew the contract, not the DG. *See* Resp't Br. at 36 (quoting that, "About one-third of the assigned counsel contractors refuse to renew their contracts for the next year...").

Moreover, the record shows that Donaldson accepted the case (despite the fact that his contract had technically expired) and intended to work diligently toward trial. Donaldson attended the status conference on August 5, 2002 despite the fact that his contract officially expired months earlier, in June. *See* Tr. 8/5/2002. At that time, he made no mention of his contract expiring, and he was clearly planning on continuing with the case. He talked at length about how he had discussed the case with Brillon's prior counsel and with Brillon (*id.* at 4); of the witnesses he planned to interview to impeach the victim (*id.* at 3, 6); of getting the approval to retain an investigator (*id.* at 4); that all the necessary notices had been filed (*id.* at 8); that all the State's witnesses had been deposed (*id.* at 7); and that he did not foresee needing to file any additional motions (*id.*).

But already, there was a sense that something was wrong in his relationship with Brillon, and a hint of what was to come. Donaldson made the unusual statement to the court that:

> I should point out that Brillon has also indicated to me that he has some concerns of my lack of experience with similar life cases that – that he's got some reservations. While he's not saying I'm not a – a good attorney he just has concerns with he knows what my case load is like and he knows what he's potentially facing and he wanted me to address that with the Court.

Id. at 4-5. In other words, although Donaldson had promptly met with Brillon, discussed the case with his prior counsel, and developed a course of action, Brillon already was so dissatisfied with Donaldson that he instructed Donaldson to inform the court of his concerns. What happened between August 5 (when Brillon was already complaining about Donaldson) and November 26 (when Donaldson agreed to withdraw) is clear: Brillon wrote to the court complaining about Donaldson (J.A. 153-54) and then filed a motion to dismiss him. J.A. 23. One could not blame Donaldson, under the circumstances, if he chose to remove himself from the case rather than argue with Brillon (as Altieri had) and risk a violent confrontation. Again, on this record, one can only speculate, but there certainly is no basis to charge the State with his time.

C. There Is No Basis to Charge The State for the Time Sleigh Spent on the Case (From November 26, 2002 or December 2, 2002 or January 15, 2003 until April 10, 2003).

Similarly, the time that Sleigh spent on the case, whether that period begins on November 26 (when the court's docket notes his assignment, *see* J.A. 24-5), or December 2, 2002 (when the DG informed him of his assignment, *see* J.A. 156), or January 15, 2003 (when the docket again notices the assignment, *see* J.A. 25), until his withdrawal on April 10, 2003 should not be charged against the State for two reasons. First, as discussed above, *supra* at 5-12, delays by defense counsel cannot be charged to the prosecution. Second, there is no record that suggests that Sleigh failed to advance the case in the months that he was assigned. Sleigh, like Donaldson, has never been given the opportunity to defend his actions. It may be that there was nothing to do other than actually prepare for trial, or it may be that he did much behind-the-scenes work that did not result in any filings. The record is simply too limited to support the Vermont Supreme Court's finding that he did little or nothing.

D. There Is No Basis to Charge The State for the Time Brillon Was Without Counsel.

The final issue is whether the administrative delays here should be chargeable to the State. While administrative delays in assigning counsel could theoretically be state action as the Solicitor General

explains, and could in certain circumstances be chargeable to the prosecution, there is no basis to do so here for two reasons. First, as discussed above, these delays would never have happened had Brillon not engaged in the outrageous act of threatening the life of his lawyer, and his repeated bad acts of firing two additional lawyers. Second, as we will discuss below, these administrative delays were reasonable under the circumstances, as Brillon had exhausted the DG's supply of assigned counsel, and the DG worked expeditiously to get the legislature to approve additional funding to hire a new lawyer. Such delays, where there is evidence of good faith efforts by the DG, should be considered at most neutral, rather than weighed against to the State.

Of course, in *Barker*, 407 U.S. at 531, this Court stated that, "A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." Because this Court has the authority to modify how "neutral" delays should be weighed, the State argues that the neutral delays in this case should not be weighed against the State at all.

Rather than conceding this period of time to Brillon (as Brillon and his *amici* claim), the State argued in its brief before the Vermont Supreme Court that the period from when Sleigh was appointed until Moore was appointed (November 27, 2002 through July 31, 2003), while "not attributable to the defendant," "should be weighed 'less heavily'

for Sixth Amendment purposes." J.A. 19. Indeed, the Vermont Supreme Court described the State's position: that the delay was "'neutral' ... and thus should not be weighed heavily against the government." J.A. 26. The key issue is not whether this time is charged to Brillon, but whether it is chargeable to the State, and if so, how heavily it should be weighed. In any event, whether the administrative delays are four months or eight months is of little consequence when Brillon and his counsel delayed the case for the remaining two-plus years.

There are two periods of administrative delay at issue, and the State will discuss them in turn.

1. *The Time Period from November 26, 2002 to January 15, 2003 Should Not Be Charged to The State.*

Although Brillon claims that he was without counsel from November 26, 2002 (when the court granted Brillon's motion to dismiss Donaldson) until Sleigh was assigned in the court records on January 15, 2003, the court docket shows that Sleigh was first assigned on November 26 (*see* J.A. 24-5); then the DG informed Sleigh of his assignment, J.A. 155-56; and then the court docket shows Sleigh being assigned (a second time) on January 15, 2003. J.A. 25

Even if, for the sake of argument, the Court were to determine that Brillon was without counsel until January 15th, and that this delay was caused by the DG, it would still be wrong to charge this time

to the State. This delay was not caused by underfunding, or by deliberate non-action, or anything else that the state can control. At most, it was a misunderstanding between the DG and attorney Sleigh over whether his appointment was "official." While a full record might show that it was Sleigh's fault (and, therefore, the time should be charged to Brillon), this was a delay of only six weeks after Brillon had delayed his trial for well more than a year by firing three lawyers. Accordingly, even if charged to the State as a "neutral" event that is weighed less heavily, *see Barker* at 531, this delay is inconsequential.

2. *The Time Between Sleigh's Withdrawal on April 10, 2003 and Moore's Assignment on August 1, 2003 Should Not Be Charged to The State.*

Clearly, Brillon was without counsel for the nearly four months between April 10, 2003 and August 1, 2003. Indisputably, this was an administrative delay attributable to the DG and funding.

However, this time, too, should not be charged against the State, because the delay was not unreasonable under the circumstances, where the DG acted expeditiously and in good faith to get additional funding from the legislature, and where the legislature immediately provided the funds that were requested.

When Brillon exhausted the DG's supply of assigned counsel on April 10, 2003, the DG worked

quickly to obtain extraordinary extra funding from the Vermont legislature to hire Moore. Within two months, the DG succeeded in convincing the Vermont state legislature to provide additional funding, *see* June 20, 2003, letter from the DG's business manager, J.A.159, and the DG advised the court that Moore would be available as of August 1, 2003. *Id.*

It goes without saying that getting a state legislature to agree to provide funding, especially on short notice, is a Herculean task. The fact that the DG was able to obtain funding so quickly speaks well both of the DG and of the legislature. The bottom line is that, in just nine weeks after learning that Brillon was without counsel, the "criminal justice system provided by the State" provided additional funding to get him a new lawyer. Clearly, this administrative delay should not be charged against the State.

The remaining delay, from June 20 (the date of the DG letter, J.A. 159) until August 1, 2003 (when Moore officially became Brillon's lawyer) should also not be attributed to the State. There is nothing in the record that explains why Moore could not begin her work on June 20. While one can only speculate, perhaps she was on vacation (it was, after all, July), and such a delay then would be chargeable to Brillon. In any event, the DG was prepared to fill in for her in the interim. *See* Business Manager's letter dated June 20, 2003, J.A. 160 (noting that "Matt Valerio, Defender General, intends to appear at this hearing....") Clearly, these delays are, at most, neutral, and if they are to be charged to the

State at all, are significantly outweighed by the delays that Brillon and his counsel caused.

This is not to say that there could *never* be an administrative delay chargeable to a state. Rather, on this record, *these* administrative delays should not be charged to the State of Vermont.

In sum, there is nothing in the record which supports the Vermont Supreme Court's findings that the State was responsible for two years of delay, and there was no legal basis to vacate Brillon's conviction.

CONCLUSION

For the foregoing reasons, the State of Vermont respectfully requests that the Court reverse the ruling of the Vermont Supreme Court.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 08-88

In the Supreme Court of the United States

STATE OF VERMONT, PETITIONER

v.

MICHAEL BRILLON

ON WRIT OF CERTIORARI
TO THE VERMONT SUPREME COURT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether delays caused solely by an indigent defendant's appointed counsel can result in the deprivation of a defendant's Sixth Amendment right to a speedy trial.

2. Whether defendants represented by appointed counsel should be afforded broader speedy trial rights than defendants who retain private counsel.

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STATE OF VERMONT, PETITIONER

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BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents issues surrounding whether pretrial delays caused solely by an indigent defendant's appointed counsel are attributable to the government in determining whether the defendant has been deprived of the Sixth Amendment right to a speedy trial. This Court's analysis of those issues will affect prosecutions in federal court. Although "[t]he more stringent provisions of the Speedy Trial Act, 18 U.S.C. § 3161 *et seq.*, have mooted much litigation about the requirements of the Speedy Trial Clause as applied to federal prosecutions," *United States* v. *Loud Hawk*, 474 U.S. 302, 304 n.1 (1986), compliance with the Act does not bar claims under the Sixth Amendment, see 18 U.S.C. 3173. The United States accordingly has a substantial interest in this case.

STATEMENT

Following a jury trial, respondent was convicted of second-degree aggravated domestic assault. He was sentenced to 12 to 20 years of imprisonment. The Vermont Supreme Court reversed after finding a violation of respondent's Sixth Amendment right to a speedy trial and remanded with instructions to set aside the conviction, vacate the sentence, and dismiss the charges with prejudice. Pet. App. 1-59.

1. On July 27, 2001, respondent confronted his girlfriend, with whom he had a child in common, at her home. When she tried to leave, respondent struck her in the face. The police were called and respondent was arrested. Pet. App. 8-9.

On July 30, 2001, respondent was charged with domestic assault in state court in Bennington County, Vermont. J.A. 11, 12. Because respondent was, at the time of the assault, forbidden by a criminal court order from harassing his girlfriend, he was charged with second-degree aggravated assault, a felony offense. Vt. Stat. Ann. tit. 13, § 1044(a)(1) (1998). And because respondent had three prior felony convictions, he was also charged as a habitual offender under Vt. Stat. Ann. tit. 13, § 11 (1998), exposing him to a life sentence. Pet. App. 3-4, 9.

2. Respondent was ultimately tried for the offense approximately three years later, in June 2004. In the intervening period, respondent was represented by six different lawyers, all of whom were either employed by the Vermont Office of the Defender General or private counsel assigned by the Defender General's Office.[1]

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[1] The Vermont Office of the Defender General has statutory responsibility for providing legal services to indigent criminal defendants. Vt. Stat. Ann. tit. 13, § 5253(a) (1998). The Defender General's Office car-

a. *July 30, 2001, to February 25, 2002.* A public defender was assigned to represent respondent, and the public defender's office appeared with respondent at his arraignment on July 30, 2001. J.A. 13; see Resp. Vt. S. Ct. Br. 9. The state district court ordered that respondent be held without bail pending an evidentiary hearing, which was scheduled for August 15, 2001. The day before the hearing, the prosecutor and the public defender stipulated to a continuance because the public defender was moving his former private practice that day. According to the public defender, respondent had consented to the continuance. Pet. App. 17-18.

A bail hearing was convened on October 2, 2001. Before the hearing began, however, the public defender asked for another continuance so that he could file a motion to recuse the trial judge, who had presided over a family-court dispute involving respondent. The public defender stated that the delay resulting from the motion would not count toward any speedy-trial claim. The next day, respondent filed a pro se motion to recuse the trial judge. The motion was denied by the trial judge on October 9, and by an administrative judge on November 20. On December 27, the prosecutor requested that the case be set for trial not later in February 2002, noting that respondent had already been in custody for five

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ries out that responsibility by distributing funds to local public defender offices and, "where necessary or appropriate," to private counsel who are retained under contract. *Id.* §§ 5253(b), 5272. When a law enforcement officer or judge notifies the Defender General's Office that an indigent person requires counsel, a public defender is assigned. *Id.* §§ 5234, 5272. If the public defender cannot provide representation, assignment is made to another attorney, who is compensated by the Defender General. *Id.* § 5272; see Pet. 4 n.3.

months. J.A. 89-90. The court granted the request. Pet. App. 18.

The bail hearing was held on January 16, 2002, and the court denied bail that same day. Pet. App. 18. The next day, the public defender moved for a continuance of the trial date on the ground that further investigation was necessary to prepare for trial. J.A. 91-93. The court denied the motion and set the jury draw for the trial for February 26, with the trial to begin the next day. Pet. App. 18-19.

On February 22, 2002, the public defender again moved to continue the trial, citing his caseload and other legal and ethical issues affecting his representation. Pet. App. 19; J.A. 97-102. At a hearing the same day, the court denied the motion. At the end of the hearing, respondent, who was participating by telephone, told the public defender that he was fired. Pet. App. 19.

Three days later, on February 25, 2002, the public defender moved to withdraw. Pet. App. 19; J.A. 103-107. The public defender explained that respondent had terminated him as assigned counsel because of claimed failure to maintain adequate communication, failure to prepare respondent's case for trial, and "certain irreconcilable differences in preferred approach * * * as to trial strategy." J.A. 103-104. At a hearing the same day, the court warned respondent that granting the motion would mean a further delay of his trial, but respondent stated that he had no choice because the public defender was not prepared for trial. The court granted the motion to withdraw, ordered the appointment of a new lawyer, and scheduled a status conference in 30 days. Pet. App. 19.

b. *February 25, 2002, to March 1, 2002.* The court appointed a second lawyer on February 28, 2002. J.A.

21. The following day, the second lawyer reported a conflict of interest. Pet. App. 19-20.

c. *March 1, 2002, to June 11, 2002.* On March 1, 2002, the court appointed a third lawyer to represent respondent. Pet. App. 19-20.

On May 16, 2002, respondent filed a pro se motion requesting a new lawyer, claiming that his third lawyer had failed to file motions, share discovery material, and communicate with him. Pet. App. 20; J.A. 113-114. Respondent also alleged that the third lawyer had "claimed that he cannot be diligent because of heavy case load." J.A. 114; see Pet. App. 20. At a hearing on June 11, respondent complained that the third lawyer had spoken to him briefly on only two occasions. Respondent further stated that he wanted to be brought to trial. The third lawyer responded that he had spoken to respondent at length about trial strategy, and he offered to make prior deposition testimony available to respondent. The lawyer also stated that he had sufficient time before trial to file a motion in limine. Near the end of the hearing, however, the lawyer moved to withdraw, indicating that respondent had threatened him during a break in the proceedings. The court granted the motion. The court told respondent that he was not entitled to manage every aspect of his defense and warned him that appointing a new lawyer would result in further delay. *Ibid.*

d. *June 11, 2002, to November 26, 2002.* After the hearing on June 11, 2002, the court appointed a fourth lawyer to represent respondent. Pet. App. 20.

At a status conference on August 5, 2002, the fourth lawyer requested an additional 60 days to prepare for trial. Pet. App. 21. He indicated that he needed an investigator to speak to six or eight people to develop pos-

sible impeachment material concerning the victim of the domestic assault. Pet. Vt. S. Ct. Br. 22. The court ordered the defense to disclose its additional witnesses by September 16 and stated that the case would be tried in October. Pet. App. 21.

On August 28, 2002, respondent wrote a letter to the court complaining that the fourth lawyer had not contacted his witnesses and had not responded to his calls and letters. J.A. 153-154; see Pet. App. 21. Two months later, on October 22, respondent filed a motion to dismiss the fourth lawyer on the ground that the lawyer had not filed motions on his behalf, had not communicated with him, had not shared discovery materials, and "refuse[d] to create an Attorney client relationship and working dialogue." J.A. 115-116; see Pet. App. 21. Respondent requested appointment of new counsel, adding: "It is not this defendant's intention to delay or compromise the orderly running of this court. It is this defendant's intention to go to trial effectively." J.A. 116.

At a hearing on November 26, 2002, the lawyer stated that he was in the process of getting out of criminal defense work and that his contract with the Defender General's office had expired in June. He also stated that the Defender General's office had indicated to him that the case would be reassigned. The court granted respondent's motion to dismiss the fourth lawyer while instructing the Defender General to assign a new lawyer as soon as possible. Pet. App. 21-22.

e. *November 26, 2002, to January 15, 2003.* A docket entry reflects that the fifth lawyer was assigned on the day of the hearing on November 26, 2002. J.A. 24. At a status conference on January 8, 2003, however, the lawyer told the court that he had been advised in December 2002 only that he might be assigned to the case and that

he had not yet received the paperwork. The court ordered the Defender General to assign a lawyer to respondent within 14 days. Pet. App. 22. On January 15, 2003, the Defender General advised the court that the fifth lawyer had been assigned to the case. *Ibid.*

f. *January 15, 2003, to April 11, 2003.* On February 25, 2003, respondent's fifth lawyer moved to extend the discovery and motion deadlines because he had been trying a case out of state for the preceding three weeks. With the prosecutor's agreement, the court granted the motion. Pet. App. 22; Resp. Vt. S. Ct. Br. 17.

On April 11, 2003, the fifth lawyer filed a notice of withdrawal, citing modifications in his firm's contract with the Defender General's Office. He told respondent that the Defender General's Office would assign another lawyer to represent him. Pet. App. 22-23.

g. *April 11, 2003, to August 1, 2003.* On May 7, 2003, respondent filed a pro se motion to dismiss his case in the interests of justice, based on the delay in bringing him to trial. J.A. 135; see Pet. App. 23. On June 20, the Defender General's Office notified the court that it had obtained funding for a serious felony unit and would hire a new lawyer for that unit who would be assigned to represent respondent beginning on August 1. *Ibid.*

h. *August 1, 2003, to June 14, 2004.* The new lawyer, who was respondent's sixth lawyer, appeared at a status conference on August 11, 2003. Pet. App. 23. The court scheduled another status conference for September 8 to allow the sixth lawyer to review the case. At that status conference, the lawyer asked for more time to review the case file. The court set a deadline of November 7 for the lawyer to review the pending motions and to advise the court which motions required rulings. The court subsequently accepted the parties' stipulation to extend

the deadline to December 8, and then further extended the deadline by 60 days, based on the sixth lawyer's representations that the files were incomplete and additional documents were needed from the prosecutor and prior defense counsel. Finally, the court accepted the parties' stipulation to extend the deadline to February 20, 2004. *Id.* at 23-24; Pet. Vt. S. Ct. Br. 24-25.

2. The sixth lawyer filed a motion to dismiss the pending charges for lack of a speedy trial and in the interests of justice, which was docketed on February 23, 2004. Pet. App. 24. On April 19, the district court denied the motion, applying the four-factor test of *Barker* v. *Wingo*, 407 U.S. 514 (1972). Pet. App. 75-80. The court held that, although there was "sufficient pre-trial delay to trigger further analysis," the delay was attributable to respondent's "demands for substitute counsel," as well as "delay in the Defender General locating and assigning substitute counsel at various stages of the proceedings," "time requested by substitute counsel to prepare once assigned," and respondent's trials on other charges then pending against him. Pet. App. 77. The court further noted that, although respondent had made requests for trial, counsel had not done so or indicated a readiness for trial. *Id.* at 78. Finally, the court noted that respondent had not claimed that he was actually prejudiced by the delay. *Ibid.*

After a trial beginning on June 15, 2004, the jury found respondent guilty of the domestic assault charges. Pet. App. 24; J.A. 17. Following his conviction, respondent renewed his motion to dismiss the charges for lack of a speedy trial and in the interests of justice. The district court denied the motion. Pet. App. 60-75. The court reiterated that respondent "made multiple demands for substitute trial counsel"; that "the delay expe-

rienced by [respondent] was in large part the result of his own actions during the course of his representation up to and through trial"; and that respondent had failed to demonstrate actual prejudice. *Id.* at 71-72.

3. The Vermont Supreme Court reversed by a 3-2 vote, holding that the nearly three-year delay between respondent's arrest and his trial violated respondent's Sixth Amendment right to a speedy trial and that the charges against respondent thus should have been dismissed with prejudice. Pet. App. 1-59.

Beginning with the first *Barker* factor, the court found that the length of the delay "weigh[ed] heavily in favor of [respondent]" because the three-year delay was "extreme" and the case was "not particularly complex." Pet. App. 15.

Turning to the second *Barker* factor, the court found that the reasons for the delay also weighed in respondent's favor. Pet. App. 4-5, 15-29. The court concluded that the first year of delay did not "count against the state" for purposes of the speedy-trial analysis because it had resulted from, among other causes, respondent's effort to recuse the trial judge and from his threat against his newly assigned counsel, who thus had to withdraw. *Id.* at 25.

The court ruled, however, that most of the remaining two-year delay between June 2002 and June 2004 was attributable to the "state"—which the court defined to mean "the combination of government entities that make up the criminal justice system." Pet. App. 4 n.1; *id.* at 26-29. The court explained that, between June 2002 and November 2002, respondent's fourth attorney sought a continuance but "apparently did little or nothing"; that a fifth attorney "was not formally assigned until January 2003, and he was allowed to withdraw four and one-half

months later without having done anything"; that a sixth attorney was not appointed until August 2003; and that, "[d]espite the already significant delay, the prosecution stipulated to several more continuances" before trial. *Id.* at 27. Although the court noted that the prosecution in the case "for the most part[] actively sought to have defendant brought to trial in a timely manner," *id.* at 4 n.1, the court nevertheless concluded that "a significant portion of the delay in bringing [respondent] to trial must be attributed to the state, even though most of the delay was caused by the inability or unwillingness of assigned counsel to move the case forward," *id.* at 27-28.

In the court's view, "[t]he defender general's office is part of the criminal justice system, and ultimately it is the court's responsibility to assure that that system prosecutes defendants in a timely manner that comports with constitutional mandates." Pet. App. 28. Accordingly, the court concluded, delay in the Defender General's Office counted against the state, even if it did "not weigh heavily against the state" because it was not designed to secure a strategic advantage. *Ibid.*

The court concluded that the third *Barker* factor also weighed in respondent's favor, finding that the record "plainly demonstrate[d]" that respondent had asserted his right to a speedy trial throughout the proceedings. Pet. App. 31. The court explained that, "[w]hen his attorneys did not move his case forward within a reasonable period of time, he asked the court to replace them with someone who would." *Id.* at 30. And although "[respondent] grudgingly consented to continuances to allow his attorneys to prepare his case, he did so only because it was apparent that the attorneys, by their own admission, were not prepared to go forward with a trial." *Ibid.* A "defendant," the court concluded, "cannot be

forced to choose between his right to a speedy trial and his right to effective counsel." *Ibid.*

Finally, the court ruled that the fourth *Barker* factor weighed in respondent's favor because of respondent's lengthy pretrial detention, even absent actual prejudice to his defense. Pet. App. 31-37.

Having found that all four of the *Barker* factors weighed against the state, the Vermont Supreme Court concluded that it was "compelled[] to exercise the extraordinary remedy of dismissing the charges in a case involving a habitual offender who was convicted of what we consider to be a very serious criminal offense—aggravated domestic assault." Pet. App. 38.

Two justices dissented. Pet. App. 39-59. The dissenters took the position that "the lion's share of delay" was attributable to respondent. *Id.* at 41. In their view, "[b]ut for [respondent's] repeated maneuvers to dismiss his lawyers and avoid trial through the first eleven months following arraignment, the difficulty in finding additional counsel would not have arisen." *Id.* at 44; see also *id.* at 50. Moreover, the dissenters concluded, "[t]he final eleven months before trial [are] entirely attributable to [respondent] as time during which his last assigned counsel requested repeated extensions, prepared for trial and filed motions—none of which was challenged by defendant as unreasonable or less than diligent." *Id.* at 41-42.

SUMMARY OF ARGUMENT

Delays caused by a criminal defendant's appointed counsel do not weigh against the government under this Court's decision in *Barker* v. *Wingo*, 407 U.S. 514 (1972), and thus do not support a finding that pretrial delay

violated the defendant's Sixth Amendment right to a speedy trial.

A. In *Barker*, this Court recognized that, when pretrial delay is attributable to a criminal defendant, it weighs against a defendant's claim that he was deprived of his constitutional speedy-trial right. See 407 U.S. at 529. A contrary rule would allow criminal defendants to delay their own trials but then reap the reward of dismissal of the charges against them.

B. Just as defendants cannot, by seeking delay, build a case for dismissal of the charges against them on speedy-trial grounds, neither can the attorneys who represent them create delay that counts towards a violation. By tradition and necessity, an attorney is authorized to manage the trial and to set strategy as she sees fit, and an attorney's actions are almost always binding on her client, absent a demonstration of ineffectiveness. Scheduling matters fall well within that authority. An attorney's actions that delay her client's trial, regardless of the reasons, are properly attributable to the defendant.

C. The Vermont Supreme Court held in this case that the scheduling actions of appointed counsel are attributable to government, rather than the defendant, because appointed counsel form part of the criminal justice system created by the government, and because the trial court bears ultimate responsibility for controlling its docket and ensuring that defense counsel work expeditiously to carry a case to trial. Neither proposition is tenable. As this Court has recognized, public defenders engaged in representation of indigent defendants act on behalf of those clients, and not on behalf of the government; thus, in the course of representation, they stand in precisely the same position as retained counsel. And a trial court's decision to grant appointed counsel's re-

quest for delay does not relieve the defendant of the consequences of that request.

D. Under a proper balancing of the *Barker* factors, no speedy trial violation occurred in this case. Respondent personally caused much of the delay through his own actions, and his attorneys' requests for additional delay does not count towards a violation. The government may be held responsible for at most six months of the three-year gap between respondent's indictment and trial, during which time the court failed to appoint replacement counsel in a timely fashion. That delay does not establish a violation of respondent's constitutional speedy-trial right. Because the delay was not the result of a deliberate effort to hamper respondent's defense, but rather due to difficulties in locating available counsel and an apparently inadvertent delay in confirming the appointment with one of respondent's lawyers, it does not weigh heavily toward a finding that the delay was constitutionally unreasonable. And the courts below agreed that respondent suffered no actual prejudice to his defense as a result. The Vermont Supreme Court's dismissal with prejudice of the charges against respondent should therefore be reversed.

ARGUMENT

THE VERMONT SUPREME COURT ERRED IN CONCLUDING THAT DELAYS CAUSED BY RESPONDENT'S APPOINTED COUNSEL DEPRIVED HIM OF HIS RIGHT TO A SPEEDY TRIAL

The Speedy Trial Clause of the Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy * * * trial." In *Barker* v. *Wingo*, 407 U.S. 514 (1972), the Court set out a four-part test for determining whether the delay be-

tween initiation of criminal proceedings and the beginning of trial violates the constitutional speedy-trial right. The test requires a court to engage in "a difficult and sensitive balancing process," *id.* at 533, that examines: (1) the length of the delay, (2) the reason for the delay, (3) the extent to which the defendant asserted his speedy trial right, and (4) the prejudice to the defendant. *Id.* at 530-533. None of the four factors describes "either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial." *Id.* at 533. "Rather, they are related factors and must be considered together with such other circumstances as may be relevant." *Ibid.* When a court finds a Speedy Trial Clause violation, "the only possible remedy" is dismissal of the charges against the defendant. *Strunk* v. *United States*, 412 U.S. 434, 440 (1973) (quoting *Barker*, 407 U.S. at 522).

The question in this case focuses on the second *Barker* factor *i.e.*, the reason for the delay. The Vermont Supreme Court found a violation because it believed that, for most of the last two years of the three years that it took to bring respondent to trial, his appointed lawyers took too long to move the case forward. The court reasoned that when a criminal defendant's trial is delayed "because of the inaction of assigned counsel," that delay is chargeable to the government, and thus weighs in favor of a finding that the delay violates the defendant's Sixth Amendment right to a speedy trial. Pet. App. 5.

The court erred in charging the government with responsibility for delays caused by respondent's appointed counsel as they familiarized themselves with respondent's case, prepared his defense, and filed pretrial motions on his behalf. Criminal defendants cannot cause

pretrial delay and then claim that a speedy-trial violation requires dismissal of the charges against them. A similar rule necessarily applies to the attorneys appointed to represent them. Delays caused by appointed counsel do not weigh in favor of a finding that a defendant has been deprived of his constitutional right to a speedy trial.

A. Pretrial Delays Caused By The Defendant Do Not Weigh In Favor Of Dismissal Of Charges On Speedy-Trial Grounds

As this Court has repeatedly recognized, the Sixth Amendment does not guarantee trial within any strictly defined time period. *Beavers* v. *Haubert*, 198 U.S. 77, 87 (1905). Because it is impossible "definitely [to] say how long is too long in a system where justice is supposed to be swift but deliberate," *Barker*, 407 U.S. at 521, the speedy-trial right is understood as a safeguard not against any and all events that may result in a delayed trial, but against "*unreasonable* delay." *Doggett* v. *United States*, 505 U.S. 647, 654 (1992) (emphasis added).

Because application of the Speedy Trial Clause ultimately turns on the reasonableness of pretrial delay, the second *Barker* factor, which concerns the reasons for the delay, is "[t]he flag all litigants seek to capture." *United States* v. *Loud Hawk*, 474 U.S. 302, 315 (1986). As this Court has explained, the second factor asks "whether the government or the criminal defendant is more to blame" for an "uncommonly long" delay before trial. *Doggett*, 505 U.S. at 651. When either the prosecution or the court is to blame, this Court has stated that the delay will generally count against the government and thus toward a finding of a Speedy Trial Clause viola-

tion, but has cautioned that "different weights should be assigned to different reasons":

> A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

Barker, 407 U.S. at 531 (footnote omitted).

That analysis of the second factor is consistent with the concept that "the primary burden [falls] on the courts and the prosecutors to assure that cases are brought to trial." *Barker*, 407 U.S. at 529. But, the Court continued: "We hardly need add that if delay is attributable to the defendant, then his waiver may be given effect under standard waiver doctrine." *Ibid.*[2]

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[2] In light of this language in *Barker*, defendant-caused delay may be analyzed either through the lens of "standard waiver doctrine" or through a determination, under *Barker*'s second factor, of whether the reason for delay counts against the defendant. The Court in *Loud Hawk* analyzed defendant-caused delay under *Barker*'s second factor—stating that an interlocutory appeal filed by a criminal defendant "ordinarily will not weigh in favor of a defendant's speedy trial claims." 474 U.S. at 316. But "standard waiver doctrine" may also simply foreclose a speedy-trial claim based on the defendant's own delay. See, *e.g.*, *United States* v. *Howard*, 218 F.3d 556, 564 (6th Cir. 2000) (excluding from speedy-trial analysis delays caused by continuances requested by defendant, citing *Barker* for the proposition that delays attributable to the defendant are waived); *United States* v. *Abou-Kassem*, 78 F.3d 161, 167 (5th Cir.) (defendant waived "entitlement to a speedy sentencing" when, after conviction, he filed a motion

2. The rule that a defendant who delays his own trial cannot later complain of that delay is consistent with historical practice. Early state speedy-trial guarantees generally said that a defendant whose trial was delayed was not entitled to discharge if the defendant himself sought or agreed to the delay. See, *e.g.*, *Pennsylvania* v. *Sheriff & Gaoler*, 16 Serg. & Rawle 304, 305 (Pa. 1827) (under state speedy-trial legislation, defendant must be discharged from imprisonment if not tried within specified period, "unless the delay happen on the application or with the assent of the defendant") (citation omitted); *Alabama* v. *Phil*, 1 Stew. 31, 32 (Ala. 1827) (under state speedy-trial legislation, "unless the delay happen on the application or with the assent of the defendant, he or she shall be discharged from imprisonment") (citation omitted); see also *United States* v. *Provoo*, 17 F.R.D. 183, 197 & n.10 (D. Md.), aff'd, 350 U.S. 857 (1955).

The rule is also consistent with the nature and purposes of the speedy-trial right. The Speedy Trial Clause is "generically different from any of the other rights enshrined in the Constitution for the protection of the accused" because, among other things, it protects not only the interests of the accused, but the "societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused." *Barker*, 407 U.S. at 519. The Court explained

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for a mental evaluation), cert. denied, 519 U.S. 818 (1996); *United States* v. *Sandoval*, 990 F.2d 481, 483 (9th Cir.) (defendant waives speedy-trial rights when he seeks to avoid detection by authorities), cert. denied, 510 U.S. 878 (1993). Under either analysis, a delay caused by the defendant himself should form no part of a valid speedy-trial claim. See *Dickey* v. *Florida*, 398 U.S. 30, 48 (1970) (Brennan, J., concurring) ("A defendant may be disentitled to the speedy-trial safeguard in the case of a delay for which he has, or shares, responsibility.").

that, while society generally has an interest in limiting the period of release on bail of accused persons who are ultimately convicted and in hastening the release of persons who are confined before trial but ultimately acquitted, see *id.* at 519-521, pretrial delay is often in the defendant's interest, *id.* at 521. As the Court explained in *Barker*, "[d]elay is not an uncommon defense tactic"; as time passes, the prosecution's witnesses "may become unavailable or their memories may fade," and the prosecution's "case will be weakened, sometimes seriously so." *Ibid.* Delay also often favors defendants because the criminal justice system provides "many procedural safeguards" to a person accused of a crime, and to observe those safeguards takes time. *United States* v. *Ewell*, 383 U.S. 116, 120 (1986). Most fundamentally, the Constitution guarantees a right to a fair trial and to the effective assistance of counsel. *E.g.*, *Strickland* v. *Washington*, 466 U.S. 668, 685-686 (1984). Delay may be sought to effectuate those rights.

Even though the Speedy Trial Clause implicates both public and private interests, this Court has recognized that the constitutional right to a speedy trial is ultimately personal to, and can be waived by, the defendant. See *Barker*, 407 U.S. at 529 (stating that defendant may waive constitutional speedy-trial right); *id.* at 530 (identifying the factors relevant to "whether a particular defendant has been deprived of *his right*") (emphasis added). The right is vindicated at the defendant's behest, and, where a violation is found, "the only possible remedy" is one that uniquely favors the defendant: the dismissal of charges without trial. *Strunk*, 412 U.S. at 440 (quoting *Barker*, 407 U.S. at 522). That remedy imposes substantial costs on society. See *id.* at 439 ("[In practice, '[dismissal] means that a defendant who may

be guilty of a serious crime will go free, without having been tried.'") (quoting *Barker*, 407 U.S. at 522).

If criminal defendants, by seeking to delay their trials, could not only reap the litigation advantages of delay but also accrue credit toward a finding of a speedy-trial violation, they could be rewarded for their dilatory conduct with the dismissal of the charges against them. Assigning responsibility for such delays to defendants, rather than the government, is a common-sense solution that avoids that result.

3. Consistent with those principles, this Court has held the government responsible for deliberate or negligent action that delays bringing a defendant to trial. See *Doggett*, 505 U.S. at 652-654 (more than eight-year delay caused by government's negligence in locating defendant); *Dickey*, 398 U.S. at 36-38 (seven-year delay resulting from government's failure, after defendant's request for a speedy trial, to secure incarcerated defendant's presence for trial); *Smith* v. *Hooey*, 393 U.S. 374, 383 (1969) (six-year delay resulting from government's failure, after defendant's requests for a speedy trial, to secure incarcerated defendant's presence for trial); *Klopfer* v. *North Carolina*, 386 U.S. 213, 218, 221-226 (1967) (18-month delay resulting from procedure that allowed state to suspend prosecution without adjudicating or dismissing charges).

In contrast, this Court has not held the government responsible for delays caused by defendants. In *Loud Hawk*, the Court held that the government was not responsible for delays resulting from the defendants' interlocutory appeals. "In that limited class of cases where a pretrial appeal by the defendant is appropriate," the Court explained, "delays from such an appeal ordinarily will not weigh in favor of a defendant's speedy

trial claims" unless the defendant showed "an unreasonable delay caused by the prosecution in that appeal, or a wholly unjustifiable delay by the appellate court." *Loud Hawk*, 474 U.S. at 316; see also *ibid.* ("A defendant who resorts to an interlocutory appeal normally should not be able upon return to the district court to reap the reward of dismissal for failure to receive a speedy trial."). And in other cases, the Court has suggested that continuances and other delays sought by the defendant do not establish a violation of the Speedy Trial Clause. See *Reed* v. *Farley*, 512 U.S. 339, 353 (1994) (rejecting the proposition that a habeas petitioner's speedy trial rights had been violated, where, "asserting a need for more time to prepare for a trial that would be 'fair and meaningful,' * * * [the habeas petitioner] himself *requested* a delay beyond the scheduled * * * opening"); *United States* v. *MacDonald*, 456 U.S. 1, 10-11 (1982) ("The Court of Appeals acknowledged, and [the defendant] concedes, that the delay between the civilian indictment and trial was caused primarily by [his] own legal maneuvers and, in any event, was not sufficient to violate the Speedy Trial Clause."); cf. *United States* v. *Taylor*, 487 U.S. 326, 340 (1988) (holding that "[r]espondent's culpable conduct and, in particular, his responsibility for the failure to meet the timely trial schedule in the first instance" were relevant factors in deciding whether dismissal with prejudice was warranted under the Speedy Trial Act, 18 U.S.C. 3161 *et seq.*).

The courts of appeals have likewise agreed that delays caused by a defendant are "not of the type that raises constitutional concerns." *Underdahl* v. *Carlson*, 462 F.3d 796, 799 (8th Cir. 2006), cert. denied, 127 S. Ct. 2039 (2007); see also, *e.g.*, *United States* v. *Abdush-*

Shakur, 465 F.3d 458, 465 (10th Cir. 2006), cert. denied, 127 S. Ct. 1321 (2007); *United States* v. *Hopkins*, 310 F.3d 145, 150 (4th Cir. 2002), cert. denied, 537 U.S. 1238 (2003); *Rashad* v. *Walsh*, 300 F.3d 27, 34-35, 36 (1st Cir. 2002), cert. denied, 537 U.S. 1236 (2003); *Gattis* v. *Snyder*, 278 F.3d 222, 231 (3d Cir.), cert. denied, 537 U.S. 1049 (2002).

B. Delays Caused By Defense Counsel Are Attributable To The Defendant And Not The Government

Just as the government is not responsible under *Barker* for delays caused by defendants, the government is not responsible for delays caused by defense counsel in the course of representation.

1. As this Court has repeatedly recognized, a represented defendant speaks through counsel, and, unless counsel is constitutionally ineffective, the decisions of counsel are generally binding on the defendant. "[T]he attorney is the [defendant's] agent when acting, or failing to act, in furtherance of the litigation, and the [defendant] must 'bear the risk of attorney error.'" *Coleman* v. *Thompson*, 501 U.S. 722, 753 (1991) (quoting *Murray* v. *Carrier*, 477 U.S. 478, 488 (1986)); see also *Link* v. *Wabash R.R.*, 370 U.S. 626, 634 (1962) (a party "is deemed bound by the acts of his lawyer-agent").

In matters of trial management in particular, an attorney's control flows not only from "law and tradition," *Faretta* v. *California*, 422 U.S. 806, 820 (1975), but also from "practical necessity," *Gonzalez* v. *United States*, 128 S. Ct. 1765, 1770 (2008). "The adversary process could not function effectively if every tactical decision required client approval." *Ibid.* (quoting *Taylor* v. *Illinois*, 484 U.S. 400, 418 (1988)). Thus, counsel is entrusted with making a variety of decisions concerning the

conduct of litigation, and "[a]bsent a demonstration of ineffectiveness, counsel's word on such matters is the last." *Id.* at 1769 (quoting *New York* v. *Hill*, 528 U.S. 110, 115 (2000)); see *Taylor*, 484 U.S. at 418 (client is bound by trial counsel's evidentiary decisions, including non-disclosure of the identity of witnesses); *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983) (counsel may decide what issues to press on appeal); *Henry* v. *Mississippi*, 379 U.S. 443, 451 (1965) (counsel may decide what evidentiary objections to raise).

2. This Court has previously held that "[s]cheduling matters are plainly among those for which agreement by counsel generally controls." *Hill*, 528 U.S. at 115; see also *Gonzalez*, 128 S. Ct. at 1770. In *Hill*, the question was whether a defense attorney could, without the express consent of his client, agree to a "specified delay in trial" that would effectively waive the client's statutory right to a speedy trial under the Interstate Agreement on Detainers, 18 U.S.C. App. §§ 1 *et seq.* at 1520 (2000). The Court held that the attorney's decision to agree to the delay was binding. The Court explained, that in matters of scheduling, "only counsel is in a position to assess the benefit or detriment of the delay to the defendant's case. Likewise, only counsel is in a position to assess whether the defense would even be prepared to proceed any earlier." *Hill*, 528 U.S. at 115. Under those circumstances, "[r]equiring express assent from the defendant himself for such routine and often repetitive scheduling determinations would consume time to no apparent purpose," and the decisions must therefore be left to the attorney's discretion. *Ibid.*

Although the question in this case concerns a constitutional, rather than statutory, right, the same principle applies. By necessity, defense counsel must be empow-

ered to make scheduling decisions on behalf of her client. And when counsel seeks a delay, that delay is attributable to the defendant, either under waiver principles (see note 2, *supra*) or the second prong of the *Barker* test. See, *e.g.*, *United States* v. *Titlbach*, 339 F.3d 692, 699 (8th Cir. 2003) (even though defendant may have been unaware that his attorney sought continuances, the resulting delays remain attributable to him); *Gattis*, 278 F.3d at 231 (delays caused by defendant's counsel do not establish violation of Speedy Trial Clause); *United States* v. *Lam*, 251 F.3d 852, 857-859 (9th Cir.) (where defense counsel sought continuances to prepare defense, delay attributable to defendant), cert. denied, 534 U.S. 1013 (2001).

C. The Vermont Supreme Court Erred In Concluding That, Under *Barker*, Delays Caused By Appointed Counsel Weighed Against The Government

The Vermont Supreme Court appeared to recognize the general principle that delay attributable to the defendant weighs against a finding of a Speedy Trial Clause violation. See Pet. App. 28. But the court declined to apply that principle to significant periods of defendant-caused delay before respondent's trial, including: a four-and-a-half-month period during which respondent's fourth lawyer was newly assigned to the case, sought a continuance to prepare, was ultimately dismissed by respondent for purported neglect, and withdrew from representation; a three-month period during which respondent's newly appointed fifth lawyer was assigned to the case, sought an extension of deadlines because he had been trying another case out of town, and ultimately withdrew; and an eleven-month period during which respondent's sixth and final lawyer

successfully sought continuances to prepare respondent's case and filed several pretrial motions, including a motion to dismiss for violation of respondent's speedy-trial rights. See J.A. 27.

In weighing those periods in favor of a speedy-trial violation, the Vermont Supreme Court offered two possible explanations for its conclusion that the "failure of * * * assigned counsel, over an inordinate period of time, to move [respondent's] case forward," was attributable to the government under the second *Barker* factor. Pet. App. 29. First, the court stated that "[t]he defender general's office is part of the criminal justice system" created by the state, *id.* at 28; see also *id.* at 4-5 & n.1. Second, the court stated that "ultimately it is the court's responsibility to assure that that system prosecutes defendants in a timely manner that comports with constitutional mandates." *Id.* at 28. Neither reason justifies attributing delays sought by appointed counsel in this case to the government, rather than to the defendant.

1. To the extent that the Vermont Supreme Court rested its decision on the proposition that appointed counsel act on behalf of the government, rather than the defendant, the court erred.

Although public defenders and other appointed counsel may be paid by the government, in representing a client they act on behalf of that client, not the government. In other contexts, this Court has recognized that public defenders acting for a client do not thereby act on behalf of the government. Rather, when a public defender represents an indigent defendant, "their relationship bec[omes] identical to that existing between any other lawyer and client." *Polk County* v. *Dodson*, 454 U.S. 312, 318 (1981). And like any other defense lawyer,

the public defender "opposes the designated representatives of the State," rather than acting on the State's behalf. For those reasons, public defenders cannot be sued under 42 U.S.C. 1983 for acts undertaken in the course of representing a client, *Polk County*, 454 U.S. at 318-319, and they are not entitled to official immunity from suit under federal law, *Ferri* v. *Ackerman*, 444 U.S. 193, 202-205 (1979). For similar reasons, when appointed counsel delay a client's trial, they do so on behalf of the defendant, not the government. The resulting delay therefore is not chargeable to the government under *Barker*.

Indeed, the framers of the Sixth Amendment could not have intended application of the Speedy Trial Clause to vary depending on whether the defendant was represented by appointed counsel. At the time the Sixth Amendment was adopted, the concept of mandatory state-furnished counsel was as yet unknown. See *Betts* v. *Brady*, 316 U.S. 455, 465-467 (1942), overruled by *Gideon* v. *Wainwright*, 372 U.S. 335 (1963). The "specific evil" against which the framers aimed in drafting the Sixth Amendment Assistance of Counsel Clause was "the English common-law rule severely limiting a felony defendant's ability to be assisted by counsel." *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 153 (2006) (Alito, J., dissenting) (citing *United States* v. *Ash*, 413 U.S. 300, 306 (1973)). The framers would have been surprised to learn that the later extension of that right to persons unable to retain private counsel would saddle the government with defense-caused delay in determining observance of the speedy-trial guarantee.

As Vermont notes (Br. 36-39), charging the government with responsibility for delays caused by public defenders, but not delays caused by privately retained

counsel, would produce untenable consequences. Such a regime would create incentives for appointed counsel to drag out proceedings, thereby increasing their clients' chances of securing dismissal on speedy-trial grounds. It could also encourage courts to treat requests for continuances less favorably when made by appointed counsel. That result would ultimately harm indigent defendants whose counsel genuinely need additional time to prepare for trial.

2. To the extent that the Vermont Supreme Court reasoned that the trial court bore vicarious responsibility for allowing defense counsel to delay proceedings, see Pet. App. 7, 28, the court also erred.

It is true that the conduct of courts is relevant in the speedy-trial analysis. See *Barker*, 407 U.S. at 531 (delays caused by "overcrowded courts" weigh less heavily against the government than intentional delay designed to hamper the defense, but "nevertheless should be considered"); *Loud Hawk*, 474 U.S. at 316 ("wholly unjustifiable delay by the appellate court" might establish Speedy Trial Clause violation in case concerning filing of interlocutory appeal). And it is also true that a trial court has "ultimate control" over, and "responsibility" for, scheduling proceedings over which it presides, including the power to grant or deny continuances. Pet. App. 28; cf. *Ungar* v. *Sarafite*, 376 U.S. 575, 589 (1964) ("The matter of continuance is traditionally within the discretion of the trial judge."). But the mere fact that a trial court has the power to deny a request to delay trial does not mean that, by granting the defense's request for delay, the trial court relieves the defense of its responsibility for that conduct. To hold the government responsible for such delays would not only be contrary to this Court's guidance in *Barker*, see 407 U.S. at 529,

but would create incentives for the defense to seek unreasonable continuances in the hopes of convincing a trial court to grant them and ultimately procuring dismissal of charges.

3. A rule that holds the government responsible under *Barker* for delays caused by appointed counsel is neither a necessary nor appropriate response to the Vermont Supreme Court's concern that, because of lack of resources, appointed counsel may unjustifiably delay trial to the detriment of their clients. See Pet. App. 5, 38-39.

a. As a preliminary matter, even without reassigning responsibility to courts for pretrial delays caused by defense counsel, courts already have substantial incentives to exercise their discretion to deny counsel's unreasonable requests to put off trial: "The condition of most criminal dockets demands reasonably prompt disposition of cases," since "an unreasonable delay in one case only serves to delay other cases, and this carries the potential for prejudice to the rights of other defendants." *United States* v. *Burton*, 584 F.2d 485, 490 (D.C. Cir. 1978), cert. denied, 439 U.S. 1069 (1979).

Defense counsel, too, have an ethical duty to act "with reasonable diligence and promptness in representing a client." Model Rules of Prof'l Conduct R. 1.3 (2004). If the workload of assigned counsel is such that accepting additional cases will interfere with their ability to provide effective representation, then they are generally advised to refuse those additional appointments. ABA, *Standards for Criminal Justice: Providing Defense Services* Standard 5-5.3 (3d ed. 1992). And if a shortage of available counsel leads to a delay in assigning a lawyer to an indigent defendant, then such a shortage may, much like the problem of "overcrowded

courts," constitute a "neutral" reason for delay that can be charged to the government under *Barker*. See 407 U.S. at 531.

Finally, if defendants are dissatisfied with counsel's diligence, they may seek the appointment of new counsel, as respondent did here.[3] And if counsel's unprofessional delays prejudice the defense, defendants may bring claims of ineffective assistance of counsel. See *Strickland*, 466 U.S. at 687.

b. This case does not, in any event, present the question whether delays caused by a lack of public-defender resources establish a violation of the Speedy Trial Clause. As the Vermont Supreme Court acknowledged (Pet. App. 38-39), the record does not establish that respondent's appointed counsel sought delays because they were overworked or underfunded. Regardless of whether a genuine "crisis" of the sort the Vermont Supreme Court imagines (Pet. App. 5), in which a State's chronic underfunding effectively leaves a defendant without counsel despite a formal appointment, would support a claim under the Speedy Trial Clause if the other factors strongly favor the grant of relief, the general rule must be that delays arising from defense counsel's requests for delay are chargeable to the defendant in speedy-trial analysis.

D. Under A Proper Balancing Of The *Barker* Factors, Respondent Is Not Entitled To A Dismissal Of The Charges In This Case

For the reasons explained above, the Vermont Supreme Court erred in ruling that "a significant portion"

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[3] Indigent defendants have no unilateral right to discharge appointed counsel in order to secure different counsel, see *Gonzalez-Lopez*, 548 U.S. at 151, but courts have discretion to accommodate such requests.

of the two-year delay between June 2002 and June 2004 was attributable to the government for purposes of the Sixth Amendment because it resulted from defense counsel's inaction. Pet. App. 27-28. The Vermont Supreme Court thus also erred in concluding that, under *Barker*, it was required to order the dismissal of the charges against respondent. See *id.* at 38, 39.

1. The first *Barker* factor, the length of delay, "defines a threshold in the inquiry: there must be a delay long enough to be 'presumptively prejudicial.'" *Loud Hawk*, 474 U.S. at 314 (quoting *Barker*, 407 U.S. at 530). In this case, the Vermont Supreme Court correctly concluded that the three-year delay from respondent's arrest in July 2001 until his trial in June 2004 was sufficiently lengthy to trigger further inquiry. Pet. App. 15; see *Doggett*, 505 U.S. at 652 & n. 1 ("Depending on the nature of the charges, the lower courts have generally found postaccusation delay 'presumptively prejudicial' at least as it approaches one year.").

2. The second *Barker* factor, the reason for delay, counts against the defendant periods of delay caused by him or his counsel. As discussed, the trial court found that "the delay experienced by [respondent] was in large part the result of his own actions during the course of his representation up to and through his trial." Pet. App. 72. And the record confirms that respondent and his counsel caused or requested virtually all of the delay in this case—through such acts as respondent's discharge of his counsel, his threats against one counsel, and successor counsels' withdrawal because of a variety of practice-related factors and trial-preparation needs. See pp. 3-8, *supra*. That leaves a total of approximately six months, including the periods between November 2002 and January 2003 and between April and August

2003, during which respondent was unrepresented, but had not waived his right to counsel.

Vermont persuasively argues (Br. 33) that those periods should be charged to respondent, whose efforts to discharge his lawyers led to the "shortage of lawyers" that left him unrepresented for a total of six months. Pet. App. 49. This Court need not decide, however, whether respondent bears sole responsibility for his lack of representation during those periods. Even if respondent bore no responsibility for the delay in appointing a fifth and sixth lawyer, any difficulties in securing counsel after exhaustion of the most readily-available options would constitute a "neutral" reason for delay, akin to "overcrowded courts," that should weigh "less heavily" against the government than, for example, "[a] deliberate attempt to * * * hamper the defense." *Barker*, 407 U.S. at 531.

3. The third *Barker* factor—whether a defendant asserted his speedy trial right—is in this case linked to the second. The Vermont Supreme Court found that the record "plainly demonstrate[d]" that respondent asserted his right to a speedy trial throughout the proceedings. Pet. App. 31. But respondent also repeatedly engaged in conduct inconsistent with the assertion of his speedy-trial right: he sought to dismiss three attorneys, even after the court explained that the result would be to delay trial, and he did not object when his sixth and final attorney sought multiple continuances or filed pretrial motions. See *Loud Hawk*, 474 U.S. at 314-315; see *id.* at 314 (finding third factor not satisfied where "[a]t the same time respondents were making a record of claims in the District Court for speedy trial, they consumed six months by filing indisputably frivolous petitions for rehearing and for certiorari"). Although the

Vermont Supreme Court reasonably concluded that respondent objected to the delays resulting from the difficulties in locating replacement counsel, the court itself acknowledged that respondent consented—if only "grudgingly"—to continuances sought by his attorneys. Pet. App. 30.

4. Finally, the Vermont Supreme Court found that the fourth *Barker* factor—the prejudice to the defendant from the delay—weighed in respondent's favor. Pet. App. 31-37. The court's finding, however, was based solely a presumption of prejudice arising from "the inordinate delay in prosecuting [respondent] while he was incarcerated." *Id.* at 37. The court agreed with the trial court that respondent had not shown actual prejudice resulting from the delay, deeming respondent's claims to the contrary to be not "substantial" and "speculative." *Ibid.*

5. A balance of the four factors weighs heavily in favor of the conclusion that respondent is not entitled to a dismissal of the charges for lack of a speedy trial. Although the three-year delay between respondent's arrest in July 2001 and the beginning of trial in June 2004 was significant, most of that delay is attributable solely to respondent and the six lawyers who represented him. And even if respondent is not held responsible for the six-month period during which he waited for new counsel to be appointed, that delay does not weigh heavily in favor of a finding of a Speedy Trial Clause violation. Even assuming that respondent adequately invoked his right to a speedy trial, he has not shown sufficient prejudice—actual or presumed—from the delay to establish entitlement to the dismissal of the charges against him.

CONCLUSION

The judgment of the Vermont Supreme Court should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

STATE OF VERMONT,

Petitioner,

v.

MICHAEL BRILLON,

Respondent.

ON WRIT OF CERTIORARI TO THE VERMONT SUPREME COURT

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, ACLU OF VERMONT, AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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INTERESTS OF *AMICI CURIAE*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Since its founding in 1920, the protection of Sixth Amendment rights and the vindication of constitutional rights more generally have been a central focus of the ACLU, which has appeared before this Court in numerous Sixth Amendment cases, both as direct counsel and as *amicus curiae*. ACLU of Vermont is one of its state affiliates.

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. Founded in 1958, NACDL has a membership of more than 12,000 and affiliate memberships of almost 40,000. Its members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL has frequently appeared as *amicus curiae* before this Court in cases concerning the Sixth Amendment as well as substantive criminal law and procedure.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

Amici are acutely aware of the strain that underfunded, mismanaged, or poorly supervised public defenders' offices impose on indigent defendants and have a strong interest in ensuring that such defendants receive the full protections of the Constitution. The Vermont Supreme Court's decision below is consistent with longstanding application of *Barker v. Wingo*, 407 U.S. 514 (1972), and should be affirmed.

INTRODUCTION AND SUMMARY OF ARGUMENT

I. The Vermont Supreme Court held that delays caused by a breakdown in the state's public defender system and the accompanying inaction by assigned counsel weigh against the state under the *Barker v. Wingo* balancing test. Petitioner Vermont asserts that this was "a first in the history of American jurisprudence" and "turns thirty-six years of settled jurisprudence into chaos." Pet'r Br. 1. That is incorrect. As Respondent Brillon demonstrates, courts applying *Barker* repeatedly have weighed such pretrial delays against the state. Resp't Br. 39-42.

As we show here, moreover, decades of jurisprudence in the closely related post-trial context illustrate the sound reasons for weighing these types of delays against the state. Courts applying *Barker*—including the Second, Third, Fourth, Ninth, and Tenth Circuit Courts of Appeals, multiple state courts, and the Armed Forces Court of Appeals—have held that delays caused by breakdowns in the appellate defender system weigh against the state. And far from creating "chaos in a vital area of criminal law," Pet'r Br. 3, these decisions

have been consistently followed and applied by lower courts for decades.

Nothing about pretrial proceedings would have justified the Vermont Supreme Court's departure from the principles embodied in these cases. On the contrary, "[a]lthough the interests at stake before trial and before appeal obviously differ, they are sufficiently similar to warrant the same general approach." *Simmons v. Beyer*, 44 F.3d 1160, 1169 (3d Cir.), *cert. denied*, 516 U.S. 905 (1995). If anything, a defendant experiencing excessive pretrial delays warrants even greater Constitutional protection.

Adopting Vermont and its government-*amici*'s[2] bright line rule, then, would result in one of two outcomes: either (1) abrogation of longstanding state and federal jurisprudence; or (2) a legal framework in which *Barker* allocates responsibility for public defender system-caused delays on appeal differently than identical delays at the pretrial level, where the risk of prejudice to defendants is greater. By contrast, the Vermont Supreme Court's decision, which allows courts to determine when and how such delays should be weighed against the state under the *Barker* balancing test, fits squarely within existing jurisprudence.

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[2] Vermont's only non-government-affiliated *amici* (and presumably the few *amici* without a financial stake in funding indigent defense) "agree that continuances and delays caused solely by an indigent defendant's public defender can rise to a speedy trial violation if attributable to the inability or unwillingness of the state public defender system to appoint adequate counsel in a timely manner." Br. of *Amici Curiae* Vermont Network Against Domestic and Sexual Violence et al. 26-27.

II. Given the well-established jurisprudence in this area, Vermont and its *amici*—through a selective and inaccurate characterization of the record—attempt to call into doubt the reasons for the nearly three-year delay in bringing Brillon to trial. But the Vermont Supreme Court, as the proper umpire for any factual dispute, has already called this play. It found that Brillon did not act with improper intent when he repeatedly sought counsel who would adequately prepare for a trial in which he faced a possible life sentence.

This Court "accept[s] the factual findings of state courts in the absence of exceptional circumstances." *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 351 (1987). Vermont and its *amici* have not addressed, much less attempted to satisfy, the exceptional circumstances standard, and this Court should decline their invitation to disturb the Vermont Supreme Court's detailed factual findings. This Court should affirm.

STATEMENT OF THE CASE

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. Const. amend. VI. For nearly three years, Brillon was incarcerated without bail before being tried as a habitual offender facing the possibility of life imprisonment. Vermont and Brillon set forth diametrically opposed reasons for the three year delay. *Compare* Pet'r Br. 4-23 *with* Resp't Br. 1-26. Our independent review of the record confirms Brillon's and the Vermont Supreme Court's recitation, and directly contradicts Vermont's version of events.

I. THE RECORD

The Vermont Supreme Court set out a useful framework for considering the record, dividing the three years of Brillon's pretrial incarceration into four distinct periods:

- From July 2001 to November 2001, during which the court attributed any delay to Brillon. *State v. Brillon*, 955 A.2d 1108, 1120 (Vt. 2008).

- From November 2001 to February 2002, which the court did "not count heavily, if at all against the state." *Id.*

- From February 2002 to June 2002, a period that the court did not count against the state. *Id.*

- From June 2002 to June 2004, a two year delay that the court weighed against the state. *Id.* at 1121.

A. July 27, 2001 to November 19, 2001: Arrest, Arraignment, and Motion to Recuse

On July 27, 2001, police arrested Brillon for domestic assault after he hit his estranged girlfriend, Michelle Tatro. Three days later, Brillon was arraigned and charged with second degree aggravated assault and as a habitual offender. J.A. 12-14. At arraignment, Brillon was ordered held without bail until an evidentiary bail hearing, scheduled for August 13, 2001 (later rescheduled by the court to August 15, 2001). *Id.* at 14.

On August 14, 2001, the prosecutor and Richard Ammons, Brillon's appointed counsel, stipulated to a continuance of the bail hearing. J.A. 15, 86-88. Ammons was a recent hire of the Bennington County Public Defender's Office and needed time to move his office to Brattleboro. J.A. 87. On October 2, 2001, Ammons asked for another continuance of the bail hearing to allow time to file a motion to recuse the trial judge, Karen Carroll, because she had presided over a family court dispute related to the charged assault. J.A. 15; *Brillon*, 955 A.2d at 1117. The next day, Ammons filed the motion to recuse, which was denied by Judge Carroll on October 9, 2001, and by an administrative judge on November 20, 2001. J.A. 16. The Vermont Supreme Court did not attribute any of these relatively routine pretrial delays to the state. *Brillon*, 955 A.2d at 1120.

B. November 20, 2001 to February 25, 2002: A Delayed Bail Hearing, Trial Preparation, and Ammons's Withdrawal

After the denial of Brillon's motion to recuse, the prosecutor moved for a February 2002 trial date, which was granted by the court. J.A. 17, 89-90.

The court held a bail hearing on January 16, 2002, and Judge Carroll ordered Brillon held without bail. J.A. 18.

On January 17, 2002, Ammons moved for a continuance in order to: (1) conclude the deposition of Tatro, Brillon's estranged girlfriend and a material prosecution witness; (2) depose additional witnesses disclosed by the prosecution on January 9, 2002; and

(3) complete an investigation that was delayed because a potential witness had been away on "medical leave" and unable to meet with Ammons. J.A. 91-92. The prosecution opposed continuance. J.A. 94-96. It argued, among other things, that "this is a simple domestic assault trial .... It is difficult to comprehend how defense counsel could still be working to develop its 'case in chief' so long after the incident." J.A. 95. On January 23, 2002, the trial judge denied the motion to continue and scheduled a jury draw for February 26, 2002 with the trial to begin on February 27th. J.A. 19.

On February 22nd, five days before Brillon's trial, Ammons filed a "Second Motion to Continue." J.A. 97-102. There, Ammons explained that "there remain[ed] significant matters that must be addressed . . . before counsel will be prepared to go forward at trial." J.A. 99. His motion added that his lack of preparation was because of "a large backlog of unfinished and untouched cases in the office." J.A. 97-98. Ammons noted that he had "an inordinately large caseload," which had only recently been "trimmed" to "174 clients with 331 charges, 55 of which [were] felonies." J.A. 98.

On February 22nd, the court held a hearing on Ammons's continuance motion. J.A. 20. During the hearing, Ammons represented that he was not prepared for trial because the "Public Defenders are under funded and under staffed." J.A. 165.[3] The trial court denied the

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[3] Ammons's representations were consistent with a 2001 report on indigent defense in Vermont, which found that the Vermont's Defender General's Office was significantly understaffed. *See* Erik Fitzpatrick, *Report of Indigent Defense Task Force* 12 (2001), *available at* http://web.archive.org/web/20020920154231/www.defgen.state.vt.us/readings/idtreport.pdf [hereinafter *Vermont Indigent Defense Report*].

motion. J.A. 20. At the end of the hearing, Brillon, who had watched via interactive television and heard that his lawyer was unprepared for a trial scheduled for less than a week away, told Ammons, "You're fired, Rick." J.A. 187.

In response to Brillon's attempt to discharge him, and in light of a conflict of interest created by his office's representation of a potential witness in Brillon's case, Ammons moved to withdraw as counsel on February 25, 2002. J.A. 20, 103-06. Because of the potential conflict and the breakdown of the attorney-client relationship, the court granted Ammons's motion to withdraw and appointed Matthew Harnett as Brillon's lawyer. J.A. 21, 192, 202. The court also cancelled the jury draw and trial date. J.A. 21.

The Vermont Supreme Court weighed this period of delay, including the period caused by Ammons's admitted unpreparedness, not heavily, if at all, against the state. *Brillon*, 955 A.2d at 1120.

C. February 25, 2002 to June 11, 2002: Harnett Withdraws over a Conflict, the Next Attorney Withdraws, and One Notice of Self Defense Is Filed

Ammons's replacement, Harnett, withdrew over a conflict on March 1, 2002, a few days after his appointment. J.A. 21. The court appointed Gerard Altieri to replace Harnett. *Id.*

On April 2, 2002, Altieri filed a Notice of Self Defense on behalf of Brillon, the first and only substantive filing he would make in the case. *Id.*

Brillon filed a *pro se* motion to dismiss Altieri on May 20, 2002. J.A. 22, 113-14. On June 11, 2002, the court held a hearing on Brillon's motion, during which Brillon complained about the excessive pretrial delays:

> I have been in jail for almost a year. I've got letters here directed towards the judge about waiving my 60-day rule. ***I want to be brought to trial. I want to be brought to trial.***

J.A. 23, 209 (emphasis added). Brillon also claimed that Altieri had spoken with him only two times: once for twenty minutes and a second time in a crowded hallway filled with Altieri's other clients. J.A. 208-09.

Altieri admitted that Brillon had some valid points, but disputed much of Brillon's position. J.A. 207-09. He claimed that he had met with Brillon twice for a total of two hours, and suggested that it was a "simple case" that would not require much work.[4] J.A. 207, 218.

During the course of this hearing, Altieri and Brillon bickered back and forth. *See generally* J.A. 207-26. It began when the court asked Altieri if he had reviewed Brillon's motion with his client. J.A. 206-07. Altieri said he had not, but added, apparently to both the court and Brillon, that "I have been up to the jail twice to meet with you for almost two hours, and that's a record for

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[4] It is unclear from the record whether Brillon had a trial date at this time. During the hearing on Brillon's motion to dismiss counsel, Altieri stated that the case would be on the September docket after the rotation of Judge Wesley. The court, however, indicated that it was unsure when the case was scheduled to go to trial. J.A. 219.

me going up there and sitting down and talking so a lot of this stuff, you know. *Michael has his issues.*" J.A. 207 (emphasis added). Brillon responded, "Mr. Altieri, I don't know how you figure you spoke to me for two hours." J.A. 208. Eventually, the court tired of the exchanges and threatened both Brillon and Altieri with contempt. J.A. 214, 216. The situation appears to have deteriorated further when Altieri, in open court, disparaged Brillon, criticizing what he described as his client's case strategy of wanting to go on a "fishing expedition and haul in people and relatives just to trash" Tatro. J.A. 218.

Following a break in the hearing, Altieri claimed that Brillon had threatened his life, prompting him to move to withdraw. J.A. 223-25. Specifically, Altieri claimed that Brillon stated, "If it takes 20 years to get even with you, I will get you." J.A. 224. Brillon denied that he had threatened Altieri's life. J.A. 225.

The court granted Brillon's motion to dismiss Altieri, noting that it was "a dubious victory in your case because it simply prolongs the time that you will remain in jail until we can bring this matter to trial . . . ." J.A. 226. The court added that it might be some time before new counsel could be appointed because "I know for a fact that our resources for ad hoc counsel are perilously thin." J.A. 227.

The Vermont Supreme Court did not weigh the delay from this period against the state. *Brillon*, 955 A.2d at 1120.

D. June 11, 2002 to June 14, 2004

1. Donaldson: Missed Deadlines and "Little or Nothing" Done

A June 11, 2002 docket entry indicates that Paul Donaldson was the next lawyer assigned to represent Brillon. J.A. 23. The Vermont Defender General's Office approved the appointment of Donaldson, even though Donaldson's contract with the Defender General was to expire in a few days. J.A. 23, 232-33 (stating "my contract with the Defender General's office had expired in June, which was in Mr. Brillon's case . . . basically the beginning of my departure from the contract"). Because of this, Donaldson did little or no work to advance the case towards trial, instead devoting his time to attempting to have the case reassigned. J.A. 233; *Brillon*, 955 A.2d at 1121 (stating Donaldson did "little or nothing").

The difficulties Brillon encountered with the appointment of contract counsel were not uncommon in Vermont, as noted in a 2001 report concerning a "crisis" in Vermont's assigned counsel program.[5]

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[5] The report identified three central problems:

> First, the assigned counsel program, which provides representation when frontline public defenders have conflicts of interest, is continuously in a virtual state of crisis: every witness with an opinion on the subject agreed that assigned counsel are all too often inexperienced lawyers providing substandard representation with inadequate supervision,

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The record reflects that Donaldson did nothing other than appear at an August 5, 2002 status conference. J.A. 23. At that conference, the court set the following filing deadlines for the defense: (1) "Defense to respond no later than 08/23/02 regarding any prior notice of bad acts evidence"; and (2) "Defense to disclose witnesses no later than 9/16/02." *Id.* The case also was to be placed on the October 2002 jury list. *Id.*

Donaldson missed the August 23 filing deadline for bad acts evidence. *Id.* He then missed the September 16 witness disclosure deadline. *Id.* Finally, the October jury list date passed, and neither Donaldson nor the court took any action. J.A. 23-24.

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> compensated at rates so low they lose money while doing so, and that for these reasons they quit their contract as soon as they can find other employment with consistent benefits and reasonable hours.
>
> Second, the public defenders' overwhelming caseload is another serious problem: on average, public defenders are handling almost double the number of cases recommended by national guidelines.
>
> Third, the Office of Defender General itself is significantly understaffed; the Defender General is required to perform the same duties delegated to several high level administrators in other states, without comparable administrative or investigative support.

Vermont Indigent Defense Report, *supra*, at 6. The report attributed these problems to "underfunding." *Id.*

In the meantime, Brillon wrote a letter to the judge informing him of Donaldson's lack of progress and that Donaldson was no longer taking appointments. J.A. 153-54. In his August 25, 2002 letter (two days after Donaldson missed the bad acts notice deadline), Brillon again expressed that he wanted to go to trial, but needed an attorney who would devote time to his case. J.A. 153 ("nor has it ever been my intention to delay any court proceedings as you know I have been in prison for 14 months and any normal person would never delay the possibility of getting out of jail, and I will win if I ever get an attorney that will work with me").

Two months later, on October 22, 2002, with the docket showing no work by Donaldson, Brillon moved *pro se* to dismiss Donaldson. J.A. 22-23. Brillon claimed that Donaldson had failed to file motions on his behalf, had not communicated with him, refused to provide him with discovery material, and had made no attempt to create an attorney-client relationship. J.A. 115.

On November 26, 2002, the court held a hearing regarding the motion to dismiss Donaldson. J.A. 24. At that hearing, Donaldson did not dispute Brillon's grounds to dismiss him as counsel. Rather, Donaldson stated that his contract was ending, that he had requested that the case be reassigned, and that a recent letter from the Defender General's Office suggested that the case would be reassigned. J.A. 232-33. During the hearing, Brillon again expressed his desire to go to trial within 60 days and highlighted the delays caused by his succession of unprepared assigned counsel. J.A. 236.

The trial court granted the motion to remove Donaldson from the case "for all reasons, including yours [Brillon's]." J.A. 238.

2. Sleigh: Administrative Errors, Appointment Delay, Discovery Extension, Withdrawal

Following the hearing on November 26, 2002, the docket indicates that the court was to send a notice to David Sleigh that he had been appointed to represent Brillon. J.A. 24-25. Sleigh was not officially appointed, however, until January 15, 2003. J.A. 25. It is not clear from the record what caused the appointment delay. At a status conference on January 8, 2003, Sleigh, participating by telephone, informed the court that he was not appearing as Brillon's counsel but as "just another lawyer in Vermont." J.A. 244. He further stated that although he had been notified via e-mail on December 2, 2002 that he might be assigned Brillon's case and had been told to review the paperwork to identify any conflicts, *id.*, he had yet to receive the file or official notification of his assignment. J.A. 244-46.[6]

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[6] The Defender General's Office blamed the court for failing to provide Sleigh with timely notice of his assignment. J.A. 155-56. Under the Vermont indigent defense system, the duty to appoint counsel falls partially on the court and partially on the Defender General. Vt. Stat. Ann. tit. 13, § 5272 ("If the public defender assigned to the court's jurisdiction is unable to represent the person, the court concerned shall assign an attorney to represent the person."); Vt. Admin. Order No. 4, § 1 (providing that assigned counsel must generally be an attorney with whom the Defender General has contracted). The Defender General is appointed by the governor subject to ratification by the state senate. Vt. Stat. Ann. tit. 13, § 5252.

As a result, Brillon was incarcerated and effectively without representation for almost two months.

At the status conference, the judge ordered the Defender General's Office to appoint counsel within 14 days. J.A. 252-53. The prosecutor noted that this order was similar to an order issued a month before, J.A. 248, and suggested that the court order a show-cause hearing requiring the "Defender General to either provide an explanation as to why counsel has not been assigned or to present an attorney before the Court." J.A. 249. The prosecutor asserted that "it seems apparent that the Defender General had previously ignored Judge Suntag's Order, or not complied with it in such a manner that made representation of Mr. Brillon possible." *Id.*

Sleigh was formally appointed on January 15, 2003. J.A. 25. He first appeared on Brillon's behalf at a February 19, 2003 status conference. *Id.* At this conference, deadlines for pretrial notices and motions were set and Brillon was assigned a May 2003 trial date. J.A. 25-26. Five days later, Sleigh filed a motion to extend the deadlines for the defense witness list and discovery but not the May trial date. J.A. 26. The trial court granted the extension on March 17, 2003. J.A. 27. Then, on April 10th, a month before Brillon was scheduled to go to trial, Sleigh wrote Brillon a letter stating that he would be withdrawing as counsel because of "modifications to our firm's contract with the Defender General." J.A. 158. The same day, Sleigh filed notice of his withdrawal with the court. J.A. 118.

3. Moore: Four Months Without Counsel and Starting Over from Scratch

After Sleigh withdrew, neither the Defender General's Office nor the court secured Brillon counsel for nearly four months. J.A. 27-28 (showing an empty docket for April, May, June, and July 2003 with the exception of *pro se* motions filed by Brillon and a rescheduling of the status conference). On June 20, 2003, however, a representative from the Defender General's Office informed the court that funding had been received for a new "serious felony unit" and attorney Kathleen Moore would staff that position on August 1, 2003. J.A. 159-60.

Meanwhile, Brillon, who had been imprisoned for nearly two years without a trial, filed *pro se* motions to dismiss for lack of a prima facie case, ineffective assistance of counsel, and violations of his speedy trial right. *See generally* J.A. 119-36. The court did not rule on these motions. J.A. 28.

On August 1, 2003, Kathleen Moore was formally appointed Brillon's attorney. J.A. 28. On August 11th she made an appearance on his behalf at a status conference, which was subsequently adjourned for 30 days. *Id.* In mid-September, the court ordered "[a]ll pending defense motions are withdrawn" and set a sixty-day deadline for all new or refiled motions. J.A. 29. On November 3, 2003, Moore filed a request to extend the motions deadline to December 8th because she was still "awaiting additional deposition transcripts and case materials from prior counsel," some of whom had been unavailable to talk with her about the case. J.A. 137. The court granted the extension. J.A. 30.

The docket reflects no formal filings or case activities between November 14, 2003 and February 11, 2004, at which time Moore requested and received another continuance. J.A. 31. On February 23, 2004, Moore filed a motion to dismiss alleging speedy trial and other violations. J.A. 31 (docket mislabels as motion in limine); *Brillon*, 955 A.2d at 1120. The court denied the motion to dismiss on April 19, 2004. J.A. 32. On April 26, 2004, a status conference was held, and a fourth trial date was set for June 15, 2004, almost three years after Brillon's arrest. J.A. 33.

The Vermont Supreme Court weighed against the state the two-year delay resulting from the inability or unwillingness of assigned counsel to move the case forward. *See Brillon*, 955 A.2d at 1121.

On June 14, 2004, Brillon had a jury drawn for trial. J.A. 38. On June 17, 2004, after a three day trial, Brillon was found guilty. J.A. 38-39. After a number of delays and continuances, Brillon was sentenced to 12 to 20 years in prison. J.A. 54.

II. BRILLON'S APPEAL

Brillon appealed. On April 16, 2008, the Vermont Supreme Court vacated his convictions and dismissed the charges, holding that Brillon had been denied his right to a speedy trial "because of the inaction of assigned counsel or a breakdown in the public defender system." *Brillon*, 955 A.2d at 1111.

ARGUMENT

I. THE VERMONT SUPREME COURT'S DECISION IS CONSISTENT WITH LONGSTANDING FEDERAL AND STATE COURT DECISIONS APPLYING *BARKER*

A. Courts Applying *Barker* Have Held That Appellate Delays Caused by Breakdowns in the Defender System Weigh Against the State

As Respondent Brillon demonstrates, state high courts that have considered the issue have found, like the Vermont Supreme Court, that pretrial delays caused by breakdowns in public defender systems weigh against the state. *E.g.*, Resp't Br. 39-40. As we show here, moreover, the Vermont Supreme Court's decision is consistent with a long line of carefully reasoned decisions evaluating the second *Barker* factor—the reason for the delay—to determine whether post-trial delays are constitutionally excessive. These courts, including the Second, Third, Fourth, Ninth, and Tenth Circuit Courts of Appeals, multiple state courts, and the Armed Forces Court of Appeals, have held that appellate delays caused by breakdowns in defender systems weigh against the state.[7]

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[7] The Constitution does not require states to grant appeals as of right to criminal defendants. *McKane v. Durston*, 153 U.S. 684, 687 (1894). But when a state has created appellate courts as "an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant, the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of

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For example, in *Brooks v. Jones*, 875 F.2d 30 (2d Cir. 1989), the court found that eight years of appellate delay had been caused by "a succession of assigned counsel, who relieved one another but did little else, and [] a pervasive want of effective supervision of the process by which the post-conviction review of indigents' rights are vindicated." *Id.* at 31. Applying *Barker*, the court charged these delays against the state, not the indigent defendant, noting that "[w]e reach our result in this case only upon a consideration of all the relevant factors, which include not only the length of the delay suffered by [the defendant], but also the state's lack of a legitimate reason for it . . . ." *Id.*; *accord Simmons v. Reynolds*, 898 F.2d 865, 868 (2d Cir. 1990) (applying second *Barker* factor and weighing appellate delay against state where "no acceptable reason for the delay has been urged; and it was caused, at least in part, by the state court's failure to supervise its appointed attorneys and to monitor its own calendar").

The Third Circuit reached a similar conclusion in *Simmons v. Beyer*, 44 F.3d 1160 (3d Cir.), *cert. denied*, 516 U.S. 905 (1995), where the defendant's appeal "slipped through the cracks," *id.* at 1169, and years of appellate delay resulted from the inaction of his public defender, notwithstanding the defendant's repeated inquiries and requests to move the case forward. *Id.* at

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the Constitution." *Evitts v. Lucey*, 469 U.S. 387, 393 (1985) (internal citation and quotation marks omitted). Applying these principles, several circuits and lower courts have held that excessive appellate delays can violate due process. *See, e.g.*, *Simmons v. Beyer*, 44 F.3d at 1169 n.6.

1163-64. In balancing the second *Barker* factor, the court found that "[r]esponsibility for this delay cannot be charged against Simmons, the victim of ineffective lawyers," and instead allocated responsibility to the state. *Id.* at 1170. The court vacated the conviction and ordered a new trial because the long appellate delay "resulted in the loss or destruction of the voir dire transcripts," impairing review of the defendant's *Batson* claims. *Id.* at 1171.

Similarly, the Tenth Circuit has held that excessive appellate delays caused by breakdowns in the Oklahoma public defender system violated indigent defendants' due process rights. *E.g.*, *Harris v. Champion*, 15 F.3d 1538, 1546 (10th Cir. 1994). At the time, the state public defender system was so underfunded and mismanaged that it routinely delayed three or more years before filing opening briefs on behalf of indigent defendants. *See id.* at 1546. "The only reasons offered by the State [for the delays] were the lack of funding and, possibly, the mismanagement of resources by the Public Defender." *Id.* at 1562. In applying *Barker*, the court noted that it previously had "laid to rest" the arguments, identical to those made by Vermont and its government-*amici* here, that delays caused by public defenders must be attributed to indigent defendants. *Id.* at 1562. Indeed, the "parties [did] not dispute that the delays in adjudicating petitioners' direct criminal appeals [were] attributable to the State of Oklahoma and not to petitioners."[8] *Id.* Because the "lack of funding and,

[8] The court noted that Oklahoma—one of Vermont's *amici* here—conceded in a submission made by the Oklahoma Attorney General that delays caused by backlogged public defenders were not attributable to the defendant. *Harris*, 15 F.3d at 1562 n.13.

possibly, the mismanagement of resources," resulted in "the inability of the Public Defender to address [the defendant's] case in a timely fashion," the court weighed the delays against the state under *Barker*. *Id.*

The Fourth and Ninth Circuits are in accord. *See United States v. Brown*, No. 05-4662, 2008 WL 4180051, at *2 (4th Cir. Sept. 10, 2008) (unpublished per curiam) (finding that under *Barker* lengthy delay on appeal due to multiple substitutions of appointed counsel weighed against the state); *Coe v. Thurman*, 922 F.2d 528, 531-32 (9th Cir. 1990) (attributing the majority of delay to court reporter and police department, but acknowledging that systemic failures noted in *Simmons v. Reynolds*, 898 F.2d 865, and *Elcock v. Henderson*, 942 F.2d 1004 (2d Cir. 1991), are appropriate reasons to weigh delay against the state).

The Court of Appeals for the Armed Forces also has weighed delays caused by the inaction of overburdened appointed defense counsel against the government under *Barker*. *Id.* In *United States v. Moreno*, 63 M.J. 129, 137 (C.A.A.F. 2006), a defendant's appeal was delayed because his appointed counsel requested eighteen extensions of time due to "other case load commitments." In holding that due process had been denied, the court recognized that counsel's "'[o]ther case load commitments' logically reflects that Moreno's case was not getting counsel's professional attention, a fact that is the very antithesis of any benefit to Moreno." *Id.* The court concluded that responsibility for such delays must rest with the government: "While appellate defense counsel's caseload is the underlying cause of much of this period of delay, responsibility for this

portion of the delay and the burden placed upon appellate defense counsel initially rests with the Government." *Id.* The court reasoned that "[t]he Government must provide adequate staffing within the Appellate Defense Division to fulfill its responsibility under the UCMJ to provide competent and timely representation." *Id.*

State courts, too, have applied *Barker* in assessing appellate delays and have attributed inaction of appointed counsel resulting from breakdowns in public defender systems against the state. *See, e.g.*, *Gaines v. Manson*, 481 A.2d 1084, 1095 (Conn. 1984) (under *Barker*, delay due to understaffing of appellate defender's office weighed against the state); *Spradlin v. State*, 587 S.E.2d 155, 160 (Ga. Ct. App. 2004) (under *Barker*, twelve-year delay in defendant's appeal due to public defender's inaction weighed against state because "[a]ny failure of the indigent defense system to represent its clients is directly or indirectly the responsibility of the State and the trial court to oversee the functioning of the criminal justice system"); *Allen v. State*, 686 N.E.2d 760, 783-84 (Ind. 1997) (finding delay in appointment of counsel weighed in defendant's favor under *Barker*, but no prejudice), *cert. denied*, 525 U.S. 1073 (1999); *State v. Bussart-Savaloja*, No. 98,527, 2008 WL 5101223, at *5 (Kan. Ct. App. Dec. 5, 2008) (refusing to attribute an 18-month delay in appointing appellate counsel to indigent appellant and noting that "[r]easons such as lack of funding, briefing delay by court-appointed attorneys, and mismanagement of resources by public defender offices are not considered acceptable excuses for inordinate delay," (citing *Harris*, 15 F.3d at 1562)); *see also State v. Dumas*, No. 98 CA

167, 2002 WL 31718862, at *7-9 (Ohio Ct. App. Nov. 26, 2002) (unpublished) (applying *Barker* to aid "in fashioning a remedy" for a violation of a defendant's right to effective assistance of counsel, even though it was not clear state law recognized a right to speedy appeal, and finding that "[d]elays arising from the inaction of [appointed] appellate counsel on appeal are not typically attributed to the defendant, at least with respect to the federal speedy trial arena").

Far from creating "chaos in a vital area of criminal law," Pet'r Br. 3, these decisions have been applied consistently for decades.[9]

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[9] *See, e.g., Brown v. Costello*, No. 00Civ.6421, 2004 WL 1837356, at *3 (S.D.N.Y. Aug. 17, 2004) (unpublished) (under *Barker*, delay "caused primarily by turnover of appointed counsel . . . is attributable to the state"); *Collins v. Rivera*, No. 99-CV-0490H, 1999 WL 1390244, at *4 (W.D.N.Y. Dec. 2, 1999) (unpublished) (under *Barker*, "where the delay in perfecting an appeal is caused by the inaction of and turnover in assigned counsel [due in part to other caseload commitments], the courts have consistently attributed that delay to the state"); *Neal v. Murray*, No. 98-CV-638H, 1999 WL 1390243, at *2 (W.D.N.Y. Oct. 5, 1999) (unpublished) (under *Barker*, delay caused by public defender's "backlog of cases" was weighed against the state); *United States ex rel. Green v. Washington*, 917 F. Supp. 1238, 1272-73 (N.D. Ill. 1996) (under *Barker*, "systemic delays" caused by underfunding and backlog at appellate defender's office weighed against state; noting that "[t]o deny an indigent [appellant] access to his appeal and then to hold him or her responsible for that denial would be truly Kafkaesque"); *Snyder v. Kelly*, 769 F. Supp. 108, 111 (W.D.N.Y. 1991) (under *Barker*, delay "due to the brobdingnagian case load of assigned counsel, as well as the inattention of the Appellate Division"

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B. The Reasons for Weighing Public Defender Delay Against the State Are Even More Compelling in the Pretrial Context

In performing the "difficult and sensitive balancing process" required by *Barker*, 407 U.S. at 533, court after court has found that it would be fundamentally unfair to charge indigent defendants—even those already convicted at trial—for delays caused by breakdowns in public defender systems. In these cases, the delays ultimately are attributed not to the defendant, but to the state.

Nothing about pretrial proceedings would have justified the Vermont Supreme Court's departure from the uniform principles embodied in these cases. On the contrary, the reasons for delay in Brillon's case mirror the breakdowns of the appellate indigent defense systems. As with Brillon, delays resulted from successive appointed counsel who "relieved one another but did

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weighed against the state), *aff'd*, 972 F.2d 1328 (2d Cir. 1992) (unpublished table decision); *Geames v. Henderson*, 725 F. Supp. 681, 685 (E.D.N.Y. 1989) (under *Barker*, delay caused by inaction of appointed counsel weighed against the state); *Harris v. Kuhlman*, 601 F. Supp. 987, 993-94 (E.D.N.Y. 1985) (institutional defects in "state's failure to screen, administer, and monitor [appointed] attorneys" was weighed against the state); *see also Threatt v. State*, 640 S.E.2d 316, 319-20 (Ga. Ct. App. 2006) (under *Barker*, noting that defendant requested a "second appellate counsel because the first one did nothing for an extended period of time" and weighing the delay against the state), *cert. denied*, 2000 Ga. LEXIS 337 (Ga. Apr. 24, 2007).

little else";[10] the failure to timely appoint counsel;[11] judicial and public defender office mismanagement of the appointed counsel system;[12] and lawyers who were

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[10] *Compare Brooks*, 875 F.2d at 31; *United States v. Brown*, 2008 WL 4180051, at *2 (discussing turnover of appointed counsel and finding, under *Barker*, delay caused by "the need for substitute [appointed] appellate counsel" weighed in favor of indigent defendant); *Brown v. Costello*, 2004 WL 1837356, at *3 (under *Barker*, delay "caused primarily by turnover of appointed counsel . . . is attributable to the state") *with* J.A. 13-28 (recording the appointment of six different counsel to represent Brillon and that four of those lawyers made few filings other than those relating to continuances or withdrawals); *Brillon*, 955 A.2d at 1121 (finding Brillon's appointed counsel were removed "because they did not do anything to move his case forward, not because of any disagreements he may have had with them over trial strategy").

[11] *Compare Yourdon v. Kelly*, 769 F. Supp. 112, 114-15 (W.D.N.Y. 1991) (discussing the two year backlog of briefs and weighing a four month delay in appointment of counsel against the state under *Barker*) *with* J.A. 24-25, 27-28, 123, 155, 159, 243-53 (showing administrative failures at the Office of the Defender General and the court leaving Brillon without counsel from November 26, 2002 until January 15, 2003, and April 10, 2003 until August 1, 2003); *Brillon*, 955 A.2d at 1121 (same).

[12] *Compare Simmons v. Reynolds*, 898 F.2d at 868 (weighing a delay caused by court's failure to "supervise its appointed attorneys and to monitor its own calendar" against the state under *Barker*) *with* J.A. 244-45 (Brillon's counsel was not aware he was appointed nearly two months after the court first ordered appointment because the court and Defender General had failed to send him the "paperwork" to review to determine if he had a conflict and "a notice to assign counsel assigning me to

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unprepared because of "other case load commitments,"[13] understaffing,[14] and underfunding,[15] among other things.

Moreover, beyond the factual similarities, courts repeatedly have recognized that "the *reasons* for constraining appellate delay are analogous to the motives underpinning the Sixth Amendment right to a speedy trial." *Rheuark v. Shaw*, 628 F.2d 297, 303 (5th Cir. 1980) (emphasis added); *accord Simmons v. Beyer*, 44 F.3d at 1169 ("Although the interests at stake before

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this case"); J.A. 249 (quoting the prosecutor stating "it seems apparent that the Defender General had previously ignored Judge Suntag's Order, or not complied with it in such a manner that made representation of Mr. Brillon possible"); J.A. 23 (showing appointed counsel missing filing deadlines and no action by the court); J.A. 26-28 (demonstrating a second trial date passing with no action by the court).

[13] *Compare Moreno*, 63 M.J. at 137 *with* J.A. 97-98, 163-67 (showing Ammons requested a continuance and was not prepared for trial because of his "inordinately large caseload").

[14] *Compare Green*, 917 F. Supp. at 1271-73 (charging the state for "systemic delays" where the public defender's office was "overwhelmed with more appointments than its staff can timely handle") *with* J.A. 165 (stating "Public Defenders are under funded and under staffed," as a reason for requesting a continuance); J.A. 227 ("[O]ur resources for ad hoc counsel are perilously thin.").

[15] *Compare Harris*, 15 F.3d at 1562 (underfunding of public defenders is not "an acceptable excuse for delay") *with* J.A. 165 (stating "Public Defenders are under funded and under staffed," as a reason for requesting a continuance).

trial and before appeal obviously differ, they are sufficiently similar to warrant the same general approach."); *Moreno*, 63 M.J. at 135 ("While *Barker* addressed speedy trial issues in a pretrial Sixth Amendment context, its four-factor analysis has been broadly adopted for reviewing post-trial delay due process claims.").[16] In fact, a defendant denied a speedy trial warrants even greater constitutional protection: "[I]f a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense. Imposing those consequences on anyone who has not yet been convicted is serious." *Barker*, 407 U.S. at 533.[17] Indeed, "excessive [pretrial]

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[16] *But see State v. Walker*, 667 A.2d 1242, 1246 (R.I. 1995) (declining to apply *Barker* analysis to post-trial delay).

[17] Of course, defendants who are incarcerated before trial—and presumed innocent—also risk violence, disease, and conditions detrimental to their wellbeing. *See, e.g.*, Prison Rape Elimination Act of 2003 § 2(2), 42 U.S.C. § 15601(2) ("[N]early 200,000 inmates now incarcerated have been or will be the victims of prison rape. The total number of inmates who have been sexually assaulted in the past 20 years likely exceeds 1,000,000."); Cindy Struckman-Johnson & David Struckman-Johnson, *Sexual Coercion Rates in Seven Midwestern Prison Facilities for Men*, 80 Prison J. 379, 379 (2000), *available at* http://www.justdetention.org/pdf/soc/SexualCoercionRates7MidwesternPrisonMen.pdf (finding that twenty-one percent of inmates faced sexual coercion and seven percent were raped in a study of seven Midwestern prisons); Associated Press, *Prison's Deadliest Inmate, Hepatis C, Escaping*, MSNBC, Mar. 14, 2007, http://www.msnbc.msn.com/id/17615346/ (by some estimates around 40% of the prison population is infected with hepatitis C, compared to 2% in the general population); Comm'n on Safety

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delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify," such that "affirmative proof of particularized prejudice is not essential to every speedy trial claim." *Doggett v. United States*, 505 U.S. 647, 655 (1992); *cf. Harris*, 15 F.3d at 1563-66 (discussing prejudice from excessive appellate delays).

It is no wonder, then, that courts applying *Barker* to pretrial delays have found that inaction by public defenders or system breakdowns can weigh against the state. As Respondent Brillon demonstrates, the Vermont Supreme Court is just one of several state high courts recognizing as much. *See People v. Johnson*, 606 P.2d 738 (Cal. 1980) (in bank) ("The right [to a speedy trial] may also be denied by failure to provide enough public defenders or appointed counsel, so that an indigent must choose between the right to a speedy trial and the right to representation by competent counsel."); *Middlebrook v. State*, 802 A.2d 268, 274-75 (Del. 2002) (discussing the court's lack of oversight of appointed counsel and finding, under *Barker*, delays caused by defense counsel's unopposed requests for continuances

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and Abuse in America's Prisons, *Confronting Confinement* 38 (2006), *available at* http://www.prisoncommission.org/pdfs/Confronting_Confinement. pdf ("Every year, more than 1.5 million people are released from jail and prison carrying a life-threatening infectious disease."). This Court repeatedly has recognized that the "interests of defendants which the speedy trial right was designed to protect," include "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Barker*, 407 U.S. at 532.

to take vacations weighed against the state); *Ruffin v. State*, 663 S.E.2d 189, 198-99 (Ga. 2008) (finding under *Barker* that delays caused by successive appointment of counsel to co-defendant could be attributed to the state and recognizing that delays caused by "overcrowded dockets, the government's failure to provide for sufficient numbers of judges, prosecutors, *or indigent defense counsel*, neglect by the prosecution or other government agents . . . must be counted against the government in the *Barker-Doggett* analysis" (emphasis added)), *petition for cert. filed* (U.S. Sept. 29, 2008) (No. 08-7602); *State v. Blair*, 103 P.3d 538, 542 (Mont. 2004) (finding that, under *Barker*, delay due to institutional reasons such as "problems" and "turmoil" in the public defender's office weighed against the state); *see also Glover v. State*, 817 S.W.2d 409, 410 (Ark. 1991) (finding that, after defendant's first counsel withdrew due to a conflict of interest, the two-month period in which the court did not appoint new counsel or inform defendant of counsel's withdrawal weighed against the state). State lower courts follow suit.[18]

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[18] *E.g.*, *Sanchez v. Superior Court*, 182 Cal. Rptr. 703, 706 (Cal. Ct. App. 1982) ("Conflicting trial obligations resulting from the routine assignment of heavy case loads to chronically overburdened deputy public defenders and appointed counsel may not constitute good cause for such delay."); *State v. Stock*, 147 P.3d 885, 893 (N.M. Ct. App. 2006) (under *Barker*, delay caused by overburdened public defender's office weighed against the state (citing *Johnson*, 606 P.2d at 741, 747; *Middlebrook*, 802 A.2d at 272-75; *Harris*, 15 F.3d at 1562; and *Moreno*, 62 M.J. at 137)), *cert. quashed*, 152 P.3d 152 (N.M. Jan. 30, 2007) (unpublished table decision); *cf. State v. Kurz*, No. A04-1255, 2005 WL 1514420, at *3 (Minn. Ct. App. June 28, 2005)

(Cont'd)

Moreover, under the fact-specific inquiry of *Barker*, courts have been quite capable of distinguishing between routine delays, delays caused by dilatory conduct of defendants or their counsel, and delays caused by breakdowns in public defender systems.[19]

The Vermont Supreme Court's opinion thus does not adopt a "unique theory," Pet'r Br. 1, but instead is in line with decades of jurisprudence from state and federal courts applying *Barker* in both the pre- and post-trial context. This Court should affirm.

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(unpublished) (finding that although "[a] combination of public-defender staffing issues and court scheduling congestion was the primary reason for delay of [defendant's] trial[,]" the weight against the state was diminished by the absence of intentional delay); *see also Isaac v. Perrin*, 659 F.2d 279, 282 (1st Cir. 1981) (holding that delay caused by the structure of the criminal system, which often left defendants without counsel for large periods of time, was institutional delay that weighs against the state); *United States v. Denson*, 668 F. Supp. 1531, 1534 n.6 (S.D. Fla. 1987) (under *Barker*, institutional failure of public defender's office to file any motions, request discovery, or demand a speedy trial weighed against state), *aff'd*, 859 F.2d 925 (11th Cir. 1988) (unpublished table decision).

[19] *See, e.g., State v. Frausto*, 53 P.3d 486, 493 (Utah Ct. App.) (distinguishing delay caused by defendant's repeated dismissal of his counsel, who all worked diligently on his appeal, from the "systematic" delay in *Harris v. Champion*), *cert. denied*, 63 P.3d 104 (Utah 2002); *see also* cases cited at Pet'r Br. 30-34.

II. NO EXCEPTIONAL CIRCUMSTANCES EXIST TO WARRANT DISPLACING THE STATE COURT'S FACTUAL FINDINGS CONCERNING THE CAUSE FOR THE THREE-YEAR DELAY IN BRINGING BRILLON TO TRIAL

In light of the well established jurisprudence in this area, Vermont and its *amici*—through a selective and inaccurate characterization of the record—attempt to call into doubt the reasons for the near three-year delay in bringing Brillon to trial. The Court should decline this invitation to displace the Vermont Supreme Court's findings of fact.

This Court traditionally "accept[s] the factual findings of state courts in the absence of exceptional circumstances." *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 351 (1987).[20] Even where relevant factual findings are

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[20] None of the exceptions to this rule is applicable here. This is not a case "where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it" or where "a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts." *Fiske v. Kansas*, 274 U.S. 380, 385-86 (1927); *accord Miller v. Fenton*, 474 U.S. 104, 114-15 (1985) (voluntariness of confession is "a legal inquiry requiring plenary review," not an issue of "historical fact" entitled to statutory deference); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 510-11 (1984) (finding of "actual malice" in an action for defamation of a public figure is subject to "independent appellate review," and "is not merely a question for the trier of fact"); *Drope v. Missouri*, 420 U.S. 162, 174-75 (1975) (finding of competence to stand trial is subject to plenary appellate review); *Brookhart v. Janis*, 384 U.S. 1, 4 n.5 (1966) (finding of waiver of a constitutional right is subject to plenary appellate review).

rendered in the first instance by a state's highest court, those facts traditionally will not be disturbed by this Court absent "exceptional circumstances." *Lloyd A. Fry Roofing Co. v. Wood*, 344 U.S. 157, 160 (1952) ("There are no exceptional circumstances of any kind that would justify us in rejecting the [Arkansas] Supreme Court's findings; they are not without factual foundation, and we accept them."); *see also Time, Inc. v. Firestone*, 424 U.S. 448, 463 (1976).

Indeed, in a situation analogous to the one here, this Court refused to disturb the facts that supported a lower court's balancing of the second *Barker* factor—the reason for pretrial delay. In *Doggett v. United States*, 505 U.S. 647 (1992), a federal district court found that the defendant, a longtime fugitive from justice, had been unaware of his indictment and that the government failed diligently to pursue his whereabouts. On appeal, the Government tried to explain the delay by claiming that it had "sought Doggett with diligence." *Id.* at 652. This Court, however, ruled that "[t]he findings of the courts below are to the contrary, . . . and we review trial court determinations of negligence with considerable deference." *Id.* (citing, *inter alia*, *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 402 (1990)). "The Government gives us nothing to gainsay the findings that have come up to us, and we see nothing fatal to them in the record." *Id.* The Court also rejected the Government's contention that the defendant had known of his indictment, stating that the defendant "won the evidentiary battle on this point" in the district court and the Government was merely "trying to revisit the facts." *Id.* at 653.

Likewise here, Vermont is merely "trying to revisit the facts" already determined by the state court. For example, the Vermont Supreme Court expressly found that Brillon had not acted with improper intent when he repeatedly sought counsel who would prepare adequately for a trial in which he faced a possible life sentence:

> While we recognize that defendants may attempt to manipulate the system by creating delay that could conceivably support later speedy-trial claims, *the record does not support the State's suggestion that this occurred here*, and the district court made no such finding. To the contrary, the record reveals that defendant consistently sought to be tried by competent counsel as quickly as possible. While defendant moved for the removal of several of the attorneys assigned to his case, *he did so because they did not do anything to move his case forward* . . . .

Brillon, 955 A.2d at 1121 (emphasis added). Any dispute over Brillon's intent presented a question of fact, which the Vermont Supreme Court resolved in Brillon's favor. *See United States v. Williams*, 128 S. Ct. 1830, 1846 (2008) ("Whether someone held a belief or had an intent is a true-or-false determination" and a "clear question[] of fact."); *Clark v. Arizona*, 548 U.S. 735, 794 (2006) ("[T]he issue of intent and knowledge is a straightforward factual question."); *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982) ("Treating issues of intent as factual matters for the trier of fact is commonplace.") (collecting cases).

Vermont invites this Court to disregard the factual findings below, in favor of its contradictory assertions that Brillon intentionally delayed his trial for various improper purposes. *See, e.g.*, Pet'r Br. 9 (asserting that Brillon fired his first lawyer "to delay the case"); *id.* at 10 (asserting that rotation of judges "gave Brillon every incentive to delay the trial"); *id.* at 12 ("Brillon turned to his fallback strategy – to delay the trial by getting rid of his counsel."); *id.* at 23 (referring to "Brillon's delay tactics"); *id.* at 27 ("In this case, there is ample evidence that many of Brillon's delays were intentional."). These "facts" are not only refuted by the record, Vermont offers no "exceptional circumstances" to justify this Court even considering them. Accordingly, this Court should defer to the Vermont Supreme Court's findings of fact and affirm the ruling below.

CONCLUSION

For the foregoing reasons, the judgment of the Vermont Supreme Court should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

STATE OF VERMONT,
Petitioner,

v.

MICHAEL BRILLON,
Respondent.

On Writ of Certiorari to the Vermont Supreme Court

BRIEF OF THE NATIONAL GOVERNORS ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether delays caused by state-funded public defenders can give rise to a Sixth Amendment speedy trial violation.

2. Whether indigent defendants with public defense counsel enjoy broader speedy trial rights than defendants with private counsel.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States.[1] As administrators of the States' criminal justice systems, *amici* have a responsibility to ensure that the State is not held accountable for the untimeliness of defense counsel when they are acting behalf of their clients, not the State. Honoring the requirement that only state action can result in constitutional violations preserves a zone of action in which the attorney-client relationship is free from undue interference by federal law. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982).

The Speedy Trial clause also protects the public interest in prompt and effective administration of criminal justice. *See Barker v. Wingo*, 407 U.S. 514 (1972). This fundamental state responsibility is advanced by legal rules that preclude criminal defendants from using delays of their own counsel to seek dismissal of the charges against them. *Amici* accordingly submit this brief to assist the Court in its resolution of this case.

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[1] The parties have consented to the filing of this *amicus* brief and their consent letters have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici* and their members, has made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

1. The Constitution protects rights only from action taken on behalf of the State. Once a public defender undertakes the representation of a criminal defendant, he acts solely on behalf of his client and adverse to the State. *Polk County v. Dodson*, 434 U.S. 312 (1981). Accordingly, while prosecutorial delay can violate a defendant's Sixth Amendment right to a speedy trial, a public defender's delays cannot, any more than delays by privately retained defense counsel.

In *Polk County*, for example, this Court held that a public defender was acting on behalf of her client—not the State—when she declined to pursue an appeal. The fact that the State funded the public defender was insufficient to render her actions "under color of state law." *Id.* at 318. "Except for the source of payment," the attorney-client relationship is "identical to that existing between any other lawyer and client." *Id.* Thus, the Court held, once a public defender commences representation of a defendant, her assignment is "in no way dependent upon state authority." *Id.*

Like cross-examining the State's witnesses and moving to suppress evidence, moving for a continuance falls within the basic responsibilities of defense counsel, whether public or private. Indeed, as the Court has recognized, delay "may work to the accused's advantage," and is "not an uncommon defense tactic." *Barker v. Wingo*, 407 U.S. 514, 521 (1972). Such an adversarial function cannot be attributed to the State.

This understanding of the defense function long predated the creation of public defender offices. Well

into the 20th century, if defense lawyers were provided for indigents at all, they were members of the private bar, working *pro bono*. Indeed, history indicates that the Framers adopted the right to counsel as the means through which criminal defendants could secure other rights—including the right to a speedy trial. The right to counsel and the right to a speedy trial, like the other protections afforded by the Sixth Amendment, were intended to protect accused persons from prosecutorial abuses that had existed under English common law. Accordingly, the defense asserts the right as a shield against dilatory action by the State.

Because the obligations of public defenders and private defense lawyers to their clients are identical, it follows that the scope of the Sixth Amendment speedy trial right is the same for indigent defendants as it is for defendants who are able to afford counsel. There is no basis for drawing a distinction under the Sixth Amendment. Whether a lawyer is paid by public funds or privately retained, he does not act on behalf of the government and cannot violate his clients' constitutional right to a speedy trial.

2. The court below erroneously held that the Sixth Amendment imposes an obligation on defense counsel to be expeditious, but this is not a constitutional requirement. As this Court has recognized, because effective assistance of counsel is the essential prerequisite for the protection of all of the defendant's rights, effectiveness cannot be sacrificed in the interest of faster trials. By ruling that criminal defendant can assert speedy trial violations for the conduct of their own counsel, the Vermont Supreme Court created an unwarranted constitutional remedy.

First, a post-conviction inquiry into defense counsel's delays would duplicate the inquiry for an ineffective assistance claim. While defense counsel—whether public or private—have a constitutional obligation to be effective, there is no independent basis for scrutinizing counsel's speed. In certain cases of prejudicial delay, the appropriate constitutional remedy is an ineffective assistance claim.

Allowing a second constitutional claim for the conduct of defense counsel would also have perverse results. Because a speedy trial claim does not require an affirmative demonstration of prejudice, it could be based on a lesser showing than an ineffective assistance claim. At the same time, a speedy trial violation provides a more severe remedy—dismissal of the indictment—than a violation of the right to counsel. This result would be an illogical inversion of Sixth Amendment concerns, since this Court has recognized that the right to counsel, as the means to secure other rights, is the most pervasive right.

Moreover, a defendant who receives the benefit of his counsel's delay should not also receive the even greater benefit of dismissal for a speedy trial violation. In *United States v. Loud Hawk*, 474 U.S. 302 (1986), for example, this Court held that a defendant's interlocutory appeal would not be counted towards a violation for this reason. Moving for a continuance is no different; indeed, defense counsel may be constitutionally required to delay if it is necessary to ensure effective assistance. Because the judgment of the court below does not comport with the purpose of either the Sixth Amendment right to a speedy trial or the right to counsel, it should be reversed.

ARGUMENT

I. BECAUSE A PUBLIC DEFENDER DOES NOT ACT ON BEHALF OF THE STATE WHEN PERFORMING TRADITIONAL DEFENSE FUNCTIONS, HE CANNOT VIOLATE HIS CLIENT'S SIXTH AMENDMENT RIGHT TO A SPEEDY TRIAL.

The Constitution shields enumerated rights only from state action. Thus, only persons acting on behalf of the State may violate the Sixth Amendment's guarantee that criminal defendants "enjoy the right to a speedy and public trial." U.S. Const. amend. VI. A public defender does not act on behalf of the State: once he undertakes representation of a defendant, he henceforth acts solely on behalf of his client and adverse to the State. Because this duty is the same for both public and private defense counsel, neither can violate their clients' constitutional right to a speedy trial.

This conclusion is squarely supported by *Polk County v. Dodson*, 454 U.S. 312 (1981), in which the Court held that a public defender was not acting on behalf of the State when she declined to pursue her client's appeal on the ground that it was frivolous. *Id.* at 314. Though the public defender was paid by the county, *id.* at 314 n.1, the Court determined that the employment relationship was "insufficient to establish that a public defender acts under color of state law within the meaning of § 1983."[2] *Id.* at 321.

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[2] Later cases have confirmed that *Polk County* refers to state action generally, not only §1983's jurisdictional requisite that an official act "under color of state law." *See Georgia v. McCollum*, 505 U.S. 42, 53 & n.9 (1992) (discussing *Polk County* as a

Rather, once a public defender begins her representation of a defendant, her "assignment entail[s] functions and obligations in no way dependent on state authority. . . . Except for the source of payment, [the] relationship [between herself and her client] [becomes] identical to that existing between any other lawyer and client." *Id.* at 318; *see also id.* ("Once a lawyer has undertaken the representation of an accused, the duties and obligations are the same whether the lawyer is privately retained, appointed, or serving in a legal aid or defender program.") (citation omitted).

Under the rule of *Polk County*, a public defender's pre-trial delay, rendered under representation to his client, does not implicate the State's authority any more than the delay of a private lawyer. Indeed, "[i]n our system a defense lawyer characteristically opposes the designated representatives of the State." *Polk County*, 454 U.S. at 318. Defense counsel, whether public or private, serve the public interest only in the most general sense, "not by acting on behalf of the State or in concert with it, but rather by advancing 'the undivided interests of his client.'" *Id.* at 318-19; *see also Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 641 (1991) (in the adversary system, "[a]ttorneys for private litigants do not act on behalf of the government . . . attorneys represent their clients"); *Faretta v. California*, 422 U.S. 806, 820 (1975) (defense counsel "shall be an aid to a will-

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state action case); *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982) ("In cases under § 1983, 'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment."); *Blum v. Yaretsky*, 457 U.S. 991, 1008-09 & n.20 (1982) (extending the reasoning of *Polk County* to state action).

ing defendant—not an organ of the State"). The State, moreover, has a constitutional obligation not to interfere with the professional independence of defense counsel.[3] *Polk County*, 454 U.S. at 321-22.

Moving for a continuance is one of the basic functions of a defense lawyer.[4] *See, e.g.*, *United States v. Lattany*, 982 F.2d 866, 882 (3d Cir. 1992) ("Each time counsel changed, the new attorney appointed to represent [defendant] had to be granted adequate time to prepare the case."). Like "enter[ing] 'not guilty' pleas, mov[ing] to suppress State's evidence, object[ing] to evidence at trial, cross-examin[ing] State's witnesses, and mak[ing closing arguments," *Polk County*, 454 U.S. at 320, it is an adversarial function. Though the court below ruled that the continuances of three of respondent's counsel violated respondent's right to a speedy trial, *see* Pet. App. 25-27, it is "peculiarly difficult to detect any color of state law in such [an] activit[y]." *Polk County*, 454 U.S. at 320.

Nor does history support the contention that the public defender is a state actor. *Cf. Towers v. Glover*, 467 U.S. 914, 921 (1984) ("No immunity for public defenders . . . existed at common law [when the Civil Rights Act was enacted] because there was, of course, no such office or position in existence at that

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[3] All defense lawyers, whether public or private, operate under standards of competence and professional responsibility that require the exercise of independent judgment. *See* ABA Model Rules of Professional Conduct 5.4 (2004); ABA Standards for Criminal Justice: Professional Independence 5-1.3 (3d ed. 1993).

[4] As the Court has repeatedly recognized, delay is often advantageous to the defendant. *See Barker*, 407 U.S. at 521; discussion *infra* pages 16-17.

time."). Until well into the 20th century, most court-appointed defense counsel were private attorneys working *pro bono*. The very concept of a "public defender," paid with public funds, is a relatively recent development: this Court did not mandate the appointment of defense counsel for indigent persons until 1963.[5] *Gideon v. Wainwright*, 372 U.S. 335 (1963); *see also Argersinger v. Hamlin*, 407 U.S. 25 (1972) (extending *Gideon* to misdemeanor cases).

Moreover, the Framers could not have been concerned about the danger of delays occasioned by defense counsel. The speedy trial right, which has roots in the Assize of Clarendon, Magna Carta, and the Habeas Corpus Act of 1679, was intended to remedy the "major evils" of "undue and oppressive incarceration" prior to trial and the "anxiety and concern accompanying public accusation." *United States v. Marion*, 404 U.S. 307, 315 n.6, 320 (1971); *see also Klopfer v. North Carolina*, 386 U.S. 213, 222-26 (1967). But at English common law prior to the adoption of the Bill of Rights, the right was asserted only against the Crown, not least because defendants had no right to counsel.[6] *See Powell v. Alabama*, 287

[5] In 1947, for example, only 20 percent of indigent persons charged with felony-level offenses were assisted by public or voluntary defender organizations. *See* Ellery E. Cuff, *Public Defender System: The Los Angeles Story*, 45 Minn. L. Rev. 715, 722 (1961) (quoting Fellman, The Defendant's Rights 125 (1958)). And while 45 States had laws requiring the appointment of counsel for indigents in felony cases by the time *Gideon* was decided, only a handful of States required appointed counsel for indigents in less serious criminal cases. *See* Comment, *Right to Counsel: The Impact of Gideon v. Wainwright in the Fifty States*, 3 Creighton L. Rev. 103, 104-106 & n.13 (1970).

[6] In late-seventeenth and early-eighteenth-century England, counsel was viewed as an impediment to efficient prosecution.

U.S. 45, 60 (1932); *see generally* Francis H. Heller, The Sixth Amendment to the Constitution of the United States (1951).

History demonstrates that both the right to counsel and the right to speedy trial, like the other protections afforded by the Sixth Amendment, were intended to address abuses of government power against citizens accused of crimes. Consequently, the defense wields the right to a speedy trial as a shield against dilatory conduct by the State; the very reason that the right to counsel "is essential" is "because they are the means through which the other rights of [the defendant] are secured." *United States v. Cronic*, 466 U.S. 648, 653 (1984). This understanding of the defense function long predated the creation of public defender offices following *Gideon*.

To be sure, *Polk County* does not hold that the adversarial posture of a public defender precludes him from being considered a state actor under all circumstances. This Court has instructed that "the determination whether a public defender is a state actor depends on the nature and context of the function he is performing." *Georgia v. McCollum*, 505 U.S. 42, 54 (1992). Outside of the professional relationship with his client, for example, a public defender is subject to constitutional strictures when making personnel decisions. *See Branti v. Finkel*, 445 U.S. 507 (1980); *see also Polk County*, 454 U.S. at 325 ("It may be . . . that a public defender also would act under color of state law while performing certain administrative and possibly investigative functions.").

James J. Tomkovicz, The Right to the Assistance of Counsel 4 (2002). The Sixth Amendment right to counsel was a response by the Colonies to the lack of the right at English common law. *See Powell*, 287 U.S. at 60-65.

Within his capacity as legal counsel, the Court has held that a public defender commits a constitutional violation when he fails to fulfill government's constitutional obligation to provide effective counsel, *see, e.g.*, *Strickland v. Washington*, 466 U.S. 668 (1984), and when he discriminatorily exercises the power conferred to him by government to choose a jury, "a quintessential governmental body." *McCollum*, 505 U.S. at 54; *Edmonson*, 500 U.S. at 624-26.

By contrast, a public defender's untimely performance does not implicate any duty imposed by government. Unlike the constitutional obligation to provide effective assistance, for example, public defenders do not have an absolute obligation to expedite trials, particularly since delay is often advantageous for their clients. And unlike the exercise of a peremptory challenge, delays by defense counsel neither bear on a governmental entity nor "invoke[ ] the formal authority of the court." *Edmonson*, 500 U.S. at 624. As the Court observed in *Barker*, "[a] defendant has no duty to bring himself to trial; the State has that duty as well as the duty of insuring that the trial is consistent with due process." 407 U.S. at 527; *Strunk v. United States*, 412 U.S. 434, 439 n.2 (1973) (it is "the prosecutor's obligation to see to it that the case is brought on for trial"). Like the defendant himself, a defense lawyer is under no constitutional duty to expedite the criminal process.

If, as *Polk County* instructs, delays by public and private defense counsel are not imputed to the State, it follows that the scope of the Sixth Amendment speedy trial right is the same for indigent defendants as it is for defendants who can afford counsel. This principle is undoubtedly correct: *Gideon* established the equality of the right to counsel, not a substantive

advantage for indigent defendants. "A rule which would apply one *fourteenth amendment* test to assigned counsel and another to retained counsel would produce the anomaly that the nonindigent, who must retain an attorney if he can afford one, would be entitled to less protection." *Cuyler v. Sullivan*, 446 U.S. 335, 345 n.9 (1980) (internal quotations omitted). Accordingly, the Court has declined to "draw[ ] a distinction between retained and appointed counsel that would deny equal justice to defendants who must choose their own lawyers." *Id.* at 344-45; *see also Ferri v. Ackerman*, 444 U.S. 193, 204 (1979) ("[The] primary office performed by appointed counsel parallels the office of privately retained counsel."). It should decline to do so here.

II. THE COURT BELOW ERRED BY CREATING AN UNWARRANTED CONSTITUTIONAL REMEDY FOR THE CONDUCT OF DEFENSE COUNSEL.

Like the parties, *amici* have a strong interest in the effective and efficient provision of legal services. But the court below erred when it sought to address the problem of public defender funding through a novel application of the speedy trial right. *See* Pet. App. 5. The court concluded that a defendant "cannot be forced to choose between . . . a speedy trial and . . . effective counsel," *id.* at 29, but only the latter right imposes a constitutional obligation on defense counsel. Because of the primacy of the right to counsel, *see Cronic*, 466 U.S. at 655-56, this Court has made clear only that defense counsel must be effective, but not necessarily fast; the State may not sacrifice effective assistance to enable speedier tri-

als.[7] *See Argersinger*, 407 U.S. at 25; *Powell*, 287 U.S. at 45. Yet holding that delays by a public defender may count toward a speedy trial violation would subject both his effectiveness and speed to federal court scrutiny on independent constitutional grounds. This is unwarranted.

First, a post-conviction inquiry into the delays of defense counsel would duplicate the inquiry for an ineffective assistance claim. Every criminal defendant represented by a public defender has a right to the effective assistance of counsel, *see Strickland*, 466 U.S. at 686, at any "critical" stage of the proceedings after an indictment issues.[8] *See United States v. Wade*, 388 U.S. 218, 224 (1967). For example, courts must already decide whether the denial of continuances, or counsel's failure to request them, vi-

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[7] In *Argersinger*, for example, the Court mandated counsel for every criminal case in which a defendant's liberty is at stake, thereby inevitably slowing the disposition of petty-offense cases. *See* 407 U.S. at 33-37. Though the Court noted the burden of an already crowded calendar on judges, in which "[a]n inevitable consequence of volume that large is the almost total preoccupation with the movement of cases," it held that dispatch could not come at the cost of fairness. *Id.* at 34-35; *see also Powell*, 287 U.S. at 56-58.

[8] To the extent that delays by public defenders are the result of inadequate funding, ineffective assistance claims may also be a mechanism for addressing this problem. Several public defender offices have refused to take on new clients or petitioned their States for funding on this basis. *See Florida v. Loveridge* (*In re* Reassignment and Consolidation of Public Defender's Motions to Appoint Other Counsel in Unappointed Noncapital Felony Cases), No. 08-1 (Fla. Cir. Ct., Sept. 3, 2008), *available at* http://www.pdmiami.com/Order_on_motion_to_appoint_other_counsel.pdf; *see also* Erik Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, N.Y. Times, Nov. 9, 2008.

olates the right to effective counsel. *See Strickland*, 466 U.S. at 678; *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983); *Unger v. Sarafite*, 376 U.S. 575, 589 (1964).

Where appropriate, the same claim should apply to requests for continuances by defense counsel.[9] In fact, defendants already may bring ineffective assistance claims for counsel's failure to assert their speedy trial rights. *See, e.g.*, *United States v. Carrasco*, 257 F.3d 1045, 1050 (9th Cir. 2001) (reviewing ineffective assistance claim for trial counsel's failure to move to dismiss indictment under the Speedy Trial Act); *Dokes v. Lockhart*, 992 F.2d 833, 838 (8th Cir. 1993) (same for trial counsel's failure to assert defense based on Ark. R. Crim. P. 28.1). And when defense counsel himself causes pre-trial delay that shades into sheer ineffectiveness, the first inquiry is "whether, in light of all the circumstances, [defense counsel's] acts or omissions were outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. Next, "any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution." *Id.* at 692. A showing of prejudice—based on a "reasonable probability that, but for counsel's unprofessional errors, the result of

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[9] Although the Due Process clause also protects defendants against prejudicial delay, *see United States v. Lovasco*, 431 U.S. 783 (1977), it cannot be violated by public defenders because they are not state actors. *See Polk County*, 454 U.S. at 315. But a defense lawyer's ineffective assistance, whether he is appointed or retained, is attributable to the State. *See Cuyler*, 446 U.S. at 335 (because a trial is an "action of the State," without "counsel able to invoke the procedural and substantive safeguards that distinguish our system of justice, a serious risk of injustice infects the trial itself").

the proceeding would have been different," *id.* at 694—is required because the purpose of the right to counsel is to ensure fairness at trial.[10] *See id.* at 691-92.

Scrutinizing counsel's performance in response to a post-conviction claim of ineffective assistance is a delicate inquiry. In *Strickland*, this Court cautioned that "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." 466 U.S. at 688-89. Some of the dangers identified by the Court in that context, including interference with the "constitutionally protected independence of counsel," *id.* at 689, would be equally manifest by judicial scrutiny of defense motions for continuances. A lawyer is presumed to have competently acted on behalf of his client. *See id.* at 690. While this presumption may be questioned by an ineffective assistance claim, there is no independent constitutional basis for second-guessing defense strategy or parsing the mo-

[10] The Speedy Trial clause, in contrast, is "not primarily intended to prevent prejudice to the defense." *United States v. MacDonald*, 456 U.S. 1, 8 (1982). And "unlike the right to counsel . . . deprivation of the right to speedy trial does not *per se* prejudice the accused's ability to defend himself." *Barker*, 407 U.S. at 521. Although the four-part test articulated by the Court in *Barker* counts prejudice to the defendant as a factor, the Court emphasized that none of the factors, including prejudice, is "either a necessary or sufficient condition" to finding a violation of the right. *Id.* at 533. This point was underscored in *Moore v. Arizona*, 414 U.S. 25 (1973) (per curiam) and *United States v. Doggett*, 505 U.S. 647 (1992), in which the Court rejected the proposition that a showing of actual prejudice was essential to finding a violation of the speedy trial right.

tivations of a defendant and his counsel on the ground that defense counsel created unreasonable delay.

Recognizing speedy trial claims based on defense delay would produce other costs. Where, as here, a defendant has successive lawyers whose cumulative continuances may be invoked in support of a speedy trial claim, a court may be tasked with separately weighing the reasons for each lawyer's delay requests—an analysis the court below did not undertake.[11] Yet "[t]he availability of intrusive post-trial inquiry" into delays by defense counsel—like the availability of post-trial inquiry into the effectiveness of counsel generally—may also "encourage the proliferation" of claims. *Id.* at 690.

Moreover, allowing a second constitutional remedy for the untimeliness of defense counsel would result in a more extreme remedy for a far less foundational concern than counsel's effectiveness. Dismissal of an indictment, an "unsatisfactorily severe remedy," is "the only possible remedy" for a speedy trial violation. *Barker*, 407 U.S. at 522; *see also Strunk*, 412 U.S. at 439-40. In contrast, a successful ineffective assistance claim typically results in vacation of the conviction and the opportunity for the State to conduct a new trial. *See United States v. Morrison*, 449 U.S. 361, 365 (1981).

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[11] For example, the court below counted the continuances by respondent's final lawyer toward the speedy trial violation even though the record shows that she used the time to assert respondent's rights in numerous motions, including a motion to dismiss for lack of speedy trial, and ultimately brought the case to trial. *See* Pet. App. 23-24; Pet. Br. 22-23.

At the same time, because a speedy trial violation may be established without an affirmative showing of prejudice to the defendant, *see, e.g.*, *United States v. Doggett*, 505 U.S. 647 (1992), counting defense counsel's delays toward a violation would require a lesser evidentiary showing than an ineffective assistance claim. This inversion of Sixth Amendment concerns runs contrary to the Court's recognition that "[o]f all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." *Cronic*, 466 U.S. at 654 (1984) (internal quotation marks omitted).

As a practical matter, there would be no meaningful restriction of the speedy trial right if delays by defense counsel were to count against the State, since defense counsel are presumed to act in their clients' interest and "[d]elay is not an uncommon defense tactic." *Barker*, 407 U.S. at 521. Indeed, "[w]ithin the limits of professional propriety, causing delay and sowing confusion not only are [defense counsel's] right but may be his duty." *Walters v. National Assoc. of Radiation Survivors*, 473 U.S. 305, 325 (1985) (quoting Henry Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267 (1975)).

Recognizing that delay is often in the defendant's interest, the Court has indicated under narrower circumstances that when the defense causes delay, it will not be counted toward a speedy trial violation. In *United States v. Loud Hawk*, the Court held that the 29 month delay resulting from a defendant's interlocutory appeal before trial would not count for this purpose—notwithstanding the defendant's repeated motions for dismissal on speedy trial grounds.

474 U.S. 302, 309 (1986). The Court reasoned that "[a] defendant who resorts to an interlocutory appeal normally should not be able upon return to the district court to reap the reward of dismissal for failure to receive a speedy trial." *Id.* at 316. The same reasoning applies when the defense moves for a continuance. Not only is it in the defendant's interest to have his counsel be as effective as possible, counsel is constitutionally required to delay if necessary to ensure effective assistance. A criminal defendant should not be able to reap the benefits of greater preparation as well as the remedy of dismissal for failure to receive a speedy trial.

As the Court has emphasized, "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system." *Strickland*, 466 U.S. at 689. Nor is the goal of the Speedy Trial clause to maximize the efficiency of public defender offices, though of course that is also an important goal, best addressed through the political branches. Notably, many States and the federal government have adopted exacting speedy-trial standards.[12] Several

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[12] *See, e.g.*, Cal. Penal Code §1381 *et seq.*; Ga. Code Ann. §17-7-170 *et seq.*; Idaho Code Ann. §19-3501; 725 Ill. Comp. Stat. Ann. 5/103-5; Kan. Stat. Ann. §22-3402; Ky. Rev. Stat. §500.110; La. Code Crim. Proc. Ann. art. 701; Md. Code Ann. §6-103; Mich. Comp. Laws §780.131 *et seq.*; Miss. Code Ann. §99-17-1; N.C. Gen. Stat. §7A-49.4; N.Y. Crim. Proc. Law §30.30; Ohio Rev. Code Ann. §2945.71 *et seq.*; Tenn. Code Ann. §40-38-105; W. Va. Code Ann. §62-3-1 *et seq.*; Wis. Stat. Ann. §971.10; Alaska R. Crim. P. 45; Ark. R. Crim. P. 28.1; Colo. R. Crim. P. 48; Fla. R. Crim. P. 3.191; Ind. R. Crim. P. 4; Iowa R. Crim. P. 2.33; Mass. R. Crim. P. 36; Minn. R. Crim. P. 11.10;

expressly stipulate that the time limits are tolled by defense delay,[13] thereby indicating that these States do not consider such delay as violating defendants' rights. The Court should not adopt a constitutional rule to the contrary.

N.M. R. Crim. P. 5-604(B)-(D); Wash. Court Crim. R. 3.3; Speedy Trial Act, 18 U.S.C. §3161 *et seq.* (federal government).

[13] *See, e.g.*, Cal. Penal Code §1381 (excluding defense continuances); 725 Ill. Comp. Stat. Ann. 5/103-5(f) (excluding "[d]elay occasioned by the defendant"); N.Y. Crim. Proc. Law §30.30(4)(b)-(f) (excluding continuances requested by defendant or his counsel and periods "during which the defendant is without counsel through no fault of the court"); Alaska R. Crim. P. 45(d) (defense continuances); Ark. R. Crim. P. 28.3 (same); Colo. R. Crim. P. 48(b)(3) (extending time 6 months from the date of the grant of defense continuance); Fla. R. Crim. P. 3.191(k) (if defendant or his "counsel is not ready for trial . . . [defendant] is not entitled to be discharged"); Ind. R. Crim. P. 4(A) (excluding defense continuances and delays caused by defendant's acts); *see also* 18 U.S.C. §3161(h)(8)(A) (excluding continuances granted for the "ends of justice").

CONCLUSION

The judgment of the Vermont Supreme Court should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

STATE OF VERMONT,

Petitioner,

v.

MICHAEL BRILLON,

Respondent.

On Writ of Certiorari to Vermont Supreme Court

BRIEF OF RETIRED STATE COURT JUSTICES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI[1]

Amici are retired state Supreme Court justices. Hon. Norman S. Fletcher joined the Supreme Court of Georgia in 1989 and served as Chief Judge of that Court from 2001 until 2005 when he retired from the bench. Hon. Stanley G. Feldman joined the Supreme Court of Arizona in 1982, and served as Chief Judge of that Court from 1996 through 1996. He retired from the bench in 2002. Hon. Stewart F. Hancock, Jr joined the New York Court of Appeals in 1986 and served as an Associate Justice until 1994 when he retired from the bench. Prior to his appointment to the Court of Appeals, Judge Hancock served nine years on the Appellate Division Fourth Department in New York.

We have reviewed thousands and thousands of appeals in criminal cases, and in doing so have considered arguments advanced by both the State and individual defendants concerning many federal constitutional holdings of this Court that apply to state criminal proceedings.

Our attention was drawn to this case due to the unique procedural posture of the questions presented. It appears to us that neither of the questions presented were properly presented before the Vermont Supreme Court, and with regard to the speedy trial question, the State pressed an argument

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

before the state court that is directly contrary to the one it presents now before the Court.

SUMMARY OF ARGUMENT

State courts have the same obligation as federal courts when federal constitutional claims are presented in state proceedings. Their task it to construe and faithfully apply federal law consistent with this Court's pronouncements. That is precisely what the Vermont Supreme Court sought to do in this case. When the speedy trial issue was before the court below, the State of Vermont conceded that some of the delay that resulted from the repeated withdrawal of appointed counsel was chargeable, pursuant to *Barker v. Wingo*, 407 U.S. 514 (1972), to the state. The State never argued before the Vermont Supreme Court, as it asserts now, that all of that time must be charged to the indigent defendant.

This case is not an appropriate one for the Court to determine when the state must assume responsibility for pretrial delays that result from indigent defense system-caused delays. The judgments of the highest state judicial tribunals should not be prone to attack by newly asserted federal issues that were neither raised nor decided below. A merits ruling in this case that overlooks or forgives the State's significant change of position will surely invite additional efforts in the future to end-run state tribunals. Therefore, the writ of certiorari should be dismissed as improvidently granted.

ARGUMENT

Neither of the questions presented by Vermont to this Court were pressed or passed upon below. With respect to the first question presented, Vermont now argues that delays attributable to breakdowns in the public defender system, which leave a defendant without counsel, are categorically excluded from consideration under the Sixth Amendment's Speedy Trial Clause. But Petitioner took exactly the opposite position in the Vermont Supreme Court, explicitly agreeing with Respondent that such delays are relevant under the Sixth Amendment and that, in this case, eight months that was attributed to such a delay weighed in Respondent's favor under the governing rule of law set forth in *Barker v. Wingo*, 407 U.S. 514 (1972). The Vermont Supreme Court, acting consistent with state law, accepted the position the parties had agreed upon without independent analysis. Under these circumstances, this Court's precedent is clear that the first question was neither pressed nor passed upon below.

Petitioner acknowledges that it did not raise the second question presented until a motion for reargument before the Vermont Supreme Court. What Petitioner fails to acknowledge is that, absent special circumstances that plainly do not apply here, arguments raised for the first time in such a motion are insufficient to invoke this Court's jurisdiction.

Because neither of the two questions presented by Petitioner were pressed or passed upon before the state's highest court, this Court's precedent is clear that the petition for certiorari should be dismissed as improvidently granted. *See, e.g., Howell v. Mississippi*, 543 U.S. 440 (2005) (per

curiam); *Adams v. Robertson*, 520 U.S. 83 (1997) (per curiam).

I. The State's Change in Position

The State now asks the Court to decide both that Respondent's requested changes of counsel and the Office of Defender General's ("ODG") inability to provide counsel cannot be attributed to the State for purposes of determining whether a speedy trial violation occurred under *Barker*. *See* Brief of Petitioner at 24-36; *see also id.* at 1 (first question presented). In other words, the State is asking this Court to hold that, regardless of the circumstances, delays attributable to a breakdown in the public defender system that renders a defendant wholly without counsel are categorically excluded from scrutiny under the Speedy Trial Clause. This is not, however, the issue presented to and decided by the Vermont Supreme Court; there, the State took precisely the opposite position.

Before the Vermont Supreme Court, the State did not present the question of whether delays caused by the defense could properly serve as a basis for a constitutional speedy trial violation. Instead, the State sought to distinguish delays the State attributed to the defendant's changes of counsel from delays the State attributed to the ODG's inability to provide any counsel for the defendant. *See* Appellee State of Vermont's Br. at 25-29. As to the latter, the State explicitly conceded that this delay could serve as a basis for a speedy trial violation, stating:

> A further delay ensued from November 27, 2002 through July 31, 2003, during which time the Office of

> the Defender General assigned an attorney who later withdrew for contractual reasons, and then was unable to replace him for funding reasons until the first day of August. While this period of time cannot be attributed to the defendant, the United States Supreme Court has held that such "neutral" reasons for delay should count less heavily than situations in which the State has deliberately sought delay. "'A more neutral reason such as negligence or overcrowded courts should be weighted less heavily'. . . *This factor then should be considered to weigh against the state, but not very strongly.*" *State v. Unwin*, 139 Vt. 186, 196 (1980), quoting *Barker v. Wingo*, 407 U.S. 514, 531 (1972).

Id. at 27-28 (emphasis added).

And later:

> By the above analysis, the delay not attributable to the defendant, or to reasonable attorney preparation or court scheduling, extends from November 27, 2001[sic] through July 31, 2001[sic], a period of eight months. However, because these delays were unintentional, they should be weighed "less heavily" for Sixth Amendment purposes.

Id. at 28-29.

As to the delays that resulted from the defendant's changes of counsel, the State argued that such delays are omitted from the speedy trial calculation because they arose out of Defendant's dissatisfaction with his attorneys and so must be attributed to the defendant. Appellee State of Vt. Br. at 26-27.

The Vermont Supreme Court, therefore, rendered its ruling under the baseline assumption that the State recognized that some delays caused by ODG should be attributed to the State. The court then rejected the State's characterization of the delays resulting from Defendant's requests to change counsel as due to the Defendant's dissatisfaction, but found instead that these delays were due to the "inability or unwillingness of assigned counsel to move the case forward." Pet. App. 28 (¶ 35). In doing so, the Court determined that these delays were of the same kind as the wholesale failure of the ODG to provide counsel, *see id.* at 27-29 (¶¶ 35-37), never needing to address the baseline question of whether *any* defense counsel-caused delay, whether inability, unwillingness to move the case forward or the complete failure to provide counsel, should be attributed to the State.

II. Because the Questions Presented by Petitioner Were Neither Pressed Nor Passed Upon Below, this Court Should Dismiss the Petition as Improvidently Granted

As this Court unanimously recognized just four years ago, "[u]nder [28 U.S.C. § 1257] and its

predecessors, this Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim 'was either addressed by or properly presented to the state court that rendered the decision we have been asked to review.'" *Howell*, 543 U.S. at 443 (2005) (quoting *Adams*, 520 U. S. at 86 and citing *Illinois v. Gates*, 462 U. S. 213, 218 (1983)). This rule applies with equal force to a failure by the State to challenge an asserted federal claim by a criminal defendant as it does to a failure by a defendant to raise the federal claim. *See Gates*, 462 U.S. at 221.

Then-Justice Rehnquist set forth the purposes underlying the important rule against this Court considering questions "not pressed or passed upon below" by the State's highest court (hereinafter, the "pressed or passed upon below" rule) in *Gates*. *Id.* at 219. First, when a question is not raised below, it is likely that the relevant facts concerning that question will not be adequately developed, as the record was not compiled with the question in mind. *Id.* at 221. Second, considerations of comity and federalism prevent this Court from upsetting a state court judgment based on an argument not raised below. "'[D]ue regard for the appropriate relationship of this Court to state courts, demands that those courts be given an opportunity to consider the constitutionality of the actions of state officials[.]" *Id.* (quoting *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434-35 (1940)). Third, "by requiring that the State first argue to the state courts [that delays caused by the public defender office's failure to provide counsel are categorically excluded from scrutiny under the Speedy Trial Clause], we permit a state court, even if it agrees with the State as a matter of federal law, to

rest on its decision on an adequate and independent state ground." *Id.* at 222.

As discussed above, the State plainly did not "press" the questions it now raises to the Vermont Supreme Court. With respect to the first question presented, the State explicitly conceded that some ODG-caused delays – namely the failure to provide counsel to Defendant for an eight month period – was attributed to the State. *See* Part I, *supra*. With respect to the second question presented, the State acknowledges that it first presented this question in a motion for reargument. Brief of Petitioner at 40. However, contrary to the State's contentions, *id.* at 41-42, this Court has made clear that questions first presented in petitions for rehearing are insufficient to satisfy the "pressed or passed upon below" rule except in special circumstances, which are inapplicable here. *See, e.g., Adams*, 520 U.S. at 90; *Hanson v. Denckla*, 357 U.S. 235, 243-44 (1958); *Radio Station WOW v. Johnson*, 326 U.S. 120, 128 (1945); *see generally*, Gressman et al., Supreme Court Practice 193-95 (9th ed. 2007).[2] Moreover, the

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[2] This is not a case where the state's highest court addressed the merits of the question in denying the State's reargument petition. *Compare* Pet. App. 81 (order of Vermont Supreme Court unanimously denying the State's motion for reargument) *with Cox Broadcasting Corp v. Cohn*, 420 U.S. 469, 476 (1975). Nor is this a case where the Vermont Supreme Court permits new arguments to be made in a reargument petition. *Compare Eddings v. Oklahoma*, 455 U.S. 104, 113-14 n.9 (1982) *with* V.R.A.P 40 (relied upon by Vermont Supreme Court in denying Petitioner's Motion for reargument at Pet. App. 81); *see also Wolfe v. Yudichak*, 571 A.2d 592, 604 (Vt. 1989) (noting that, under V.R.A.P. 40, the Vermont Supreme Court declines to consider new theories raised for the first time in a motion for reargument); *Champlain Val. Exposition, Inc. v. Village of Essex Junction*, 309 A.2d 25, 30 (Vt. 1973) (same).

State's contention that it was surprised by the basic holding of the Vermont Supreme Court the State challenges here (namely, that delays attributable to breakdowns in the public defender system are subject to scrutiny under the Speedy Trial Clause), *see* Brief of Petitioner at 43, is disingenuous: as discussed, the State conceded precisely this principle below.[3]

As a last resort, the State contends that this Court "may have the authority to use its discretion to consider a Federal question even if the question was never raised in the state court below," because the "pressed or passed upon below" rule may not be jurisdictional. Brief of Petitioner at 47. But, even assuming the rule is prudential rather than jurisdictional, Petitioner has pointed to no circumstances that would justify an exception to the rule's application, and thus, as it has done in past cases, this Court need not decide whether or not the rule is indeed jurisdictional. *Howell*, 543 U.S. at 445-46 (citing cases). The fact that the merits of this case involve an issue of criminal law, *see* Brief of Petitioner at 48, does not justify an exception to the "passed or pressed upon below" rule. *See, e.g.*, *Howell*, 543 U.S. at 445-46; *Heath v. Alabama*, 474 U.S. 82, 87 (1985); *Gates*, 462 U.S. at 222.[4]

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[3] For a similar reason, the State's argument that the second question presented is properly before the Court because it simply "enlarges" the first question presented, Brief of Petitioner at 44-47, is unavailing: as discussed herein, the first question presented was also not "pressed or passed upon" by the Vermont Supreme Court.

[4] If the issue is as consequential as the State suggests, it will surely find its way before this Court again soon in an

Moreover, the Vermont Supreme Court did not "pass upon" these questions within the meaning of *Gates*. The State asserts that the Vermont Supreme Court passed upon the first question presented, pointing to language in the second paragraph of the state court's decision stating that delays caused by inaction of the public defender or a breakdown in the public defender system can give rise to a speedy trial violation. Brief of Petitioner at 45 (quoting Pet. App. 5 (¶ 2)). The State misconstrues the "pass[ed] upon" requirement: as this Court held in *Gates*, that requirement is not satisfied when the state's highest court, without undertaking a thorough analysis of its own, simply states or applies a legal principle that has not been contested by the parties. *Gates*, 462 U.S. at 222-23 (discussing *Morrison v. Watson*, 154 U.S. 111 (1894)). And, that is precisely what happened here. The Vermont Supreme Court simply, and briefly, acknowledged a legal principle conceded by both parties to be correct: namely, that delays attributable to a breakdown in the public defender system that leaves a defendant wholly unrepresented weigh in the defendant's favor under the second *Barker* factor. *See* Part I, *supra*. Indeed, had the Vermont Supreme Court known that the State planned to abandon its concession on this point, that court would have relied on an adequate and independent state ground to reject the State's effort: under the Vermont Supreme Court's jurisprudence, a party's concession with regard to an issue is regarded as an abandonment of that issue, so that the issue is waived on appeal. *See State v.*

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appropriate vehicle—namely, in a case where the state's highest court *did* have an opportunity to pass upon the issue.

Cunningham, 954 A.2d 1290, 1293, n. 2 (Vt. 2008).[5] In short, because "there was never any real contest upon the point," the Vermont Supreme Court did not "pass upon" the first question now presented by the State to this Court. *Gates*, 462 U.S. at 223, 218.

In effect, the State is inviting this Court to modify its settled precedent so that a State may concede the correctness of a legal principle to its highest court, and then, once the state's highest court adopts that principle in light of the parties' agreement, turn around and ask this Court to overrule the judgment of the state's highest court based on the State's flipping positions. For at least three reasons, this Court should decline the State's invitation.

First, as then-Justice Rehnquist recognized in *Gates*, adequate factual development on a question normally depends upon the question being litigated below. *Gates*, 462 U.S. at 221. In this case, the prosecution's agreement that breakdowns in the provision of counsel were chargeable to the state under *Barker* precluded the necessity of developing factually the extent of or reasons for that breakdown, which appears from the record to have been significant.

Second, the approach urged by the State would harm the decisional process of the state courts. State appellate courts, like this Court, depend on the

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[5] *See also State v. Lockwood*, 632 A.2d 655, 659 n.1 (Vt. 1993) (finding party waived issue as to state constitutional question not "squarely raised" before the court); *cf. Havill v. Woodstock Soapstone Co.*, 924 A.2d 6, 10 (Vt. 2007) (finding issues not raised on appeal waived); *Persons v. Lehoe*, 554 A.2d 681, 684 (Vt. 1988) (declining to decide issues not adequately briefed).

parties for the "proper adversarial presentation" of competing positions. *Massachusetts v. EPA*, 127 S.Ct. 1438, 1453 (2007) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)); *see also Lujan*, 504 U.S. at 581 (Kennedy, J., concurring in part and concurring in the judgment). It is these adversarial arguments "'which sharpen[] the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" *Baker v. Carr*, 369 U.S. 186, 204 (1962); *see Massachusetts*, 127 S.Ct. at 1453. Here, the State deprived the Vermont Supreme Court of such proper adversarial presentation by failing to present the basic question it has presented to this Court; indeed, as noted, the State took the opposite position on that question but argued that it should prevail on other grounds. Having lost on those other grounds, the State has reversed course on the question presented here. This type of sandbagging is inconsistent with basic notions of orderly appellate review. As Justice Scalia stated in a similar context: "The very word 'review' presupposes that a litigant's arguments have been raised and considered in the tribunal of first instance. To abandon that principle is to encourage the practice of 'sandbagging': suggesting or permitting, for strategic reasons, that the trial court pursue a certain course, and later—if the outcome is unfavorable—claiming that the course followed was reversible error." *Freytag v. C.I.R.*, 501 U.S. 868, 895 (1991) (Scalia, J., joined by O'Connor, Kennedy, and Souter, JJ., concurring in part and concurring in the judgment).

Third, and most important, the State's "we are entitled to switch positions because we lost before our highest court" argument is, as then-Justice Rehnquist also recognized in *Gates*, fundamentally

irreconcilable with principles of federalism and comity. "In our federal system, state courts have primary responsibility for enforcing constitutional rules in their own criminal trials." *Withrow v. Williams*, 507 U.S. 680, 698 (1993) (O'Connor, J., joined by Rehnquist, C.J., concurring in the judgment). Just as federalism and comity demand that state courts have a fair opportunity to address federal constitutional claims raised by criminal defendants (whether on direct or postconviction review), those principles demand that state courts have a fair opportunity to address defenses to federal constitutional claims raised by the State. *See Gates*, 462 U.S. at 221. This Court's discussion of the exhaustion doctrine in *Coleman v. Thompson* is thus equally applicable here:

> [I]n a federal system, the States should have the first opportunity to address and correct alleged violations of state prisoner's federal rights. As we explained in *Rose* [*v. Lundy*, 405 U.S. 509, 518 (1982)]: "The exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings. Under our federal system, the federal and state courts are equally bound to guard and protect rights secured by the Constitution. Because it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation, federal courts apply the doctrine of comity,

> which teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter."

501 U.S. 722, 731 (1991) (additional citations and alteration omitted).

CONCLUSION

Neither question raised by Petitioner was "pressed or passed upon below." Therefore, consistent with well-settled jurisprudence, amici respectfully submit that this Court should dismiss the petition for certiorari as improvidently granted. To permit Petitioner to reverse positions and so that it can have a second bite of the apple before this Court would be antithetical to principles of comity and federalism.

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AMICUS CURIAE BRIEF

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In The
Supreme Court of the United States

STATE OF VERMONT,

Petitioner,

vs.

MICHAEL BRILLON,

Respondent.

On Writ Of Certiorari
To The Vermont Supreme Court

BRIEF OF UTAH, ALABAMA, ALASKA, ARIZONA, ARKANSAS, COLORADO, DELAWARE, FLORIDA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, MAINE, MASSACHUSETTS, MICHIGAN, MINNESOTA, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, VIRGINIA, WASHINGTON, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

This Court has long recognized that a defendant's right to a speedy trial "does not preclude the rights of public justice." *Beavers v. Haubert*, 198 U.S. 77, 87 (1905). The Speedy Trial Clause instead "protects societal interests, as well as those of the accused." *United States v. Marion*, 404 U.S. 307, 330 (1971) (Douglas, J., concurring) (quotations and citation omitted). This Court's speedy trial jurisprudence therefore protects both "the rights of the accused" and "the ability of society to protect itself." *Barker v. Wingo*, 407 U.S. 514, 521 n.15 (1972) (quotations and citation omitted).

The decision below threatens this public interest by holding the government accountable for delays that are caused by public defenders in criminal prosecutions. As the primary officers entrusted with criminal justice in the United States, the *amici* States have a substantial interest in retaining their ability to prosecute cases without being held accountable for delays over which they had no control. If accepted by this Court, the Vermont Supreme Court's decision will compromise that ability.

SUMMARY OF ARGUMENT

In the opinion below, the Vermont Supreme Court held that delays caused by public defenders are attributed to the government for purposes of the speedy trial analysis. This decision is fundamentally flawed on two levels.

First, this decision blurs the line that separates the government from public defenders in a criminal prosecution. Though this Court's speedy trial jurisprudence has always distinguished between defendants and government actors, public defenders are not government actors. Like privately-retained defense counsel, public defenders represent the interests of their client, not the government, and therefore act as the adversaries of the government in a criminal prosecution. The actions of public defenders should not be attributed to the government for purposes of the Speedy Trial Clause.

Second, the decision below also draws a new line between the speedy trial rights of indigent and non-indigent defendants. If accepted by this Court, this decision would change the way prosecutors pursue cases against indigent defendants. Specifically, prosecutors would have an incentive to oppose requests for continuances that are filed by indigent defendants, and trial courts would have an incentive to deny such requests. The unintended consequence of this approach would be indigent defendants who are rushed to trial in order to avoid a violation of their redefined speedy trial right.

ARGUMENT

I.

THE DECISION BELOW BLURS THE LINE THAT SEPARATES THE GOVERNMENT FROM PUBLIC DEFENDERS IN A CRIMINAL PROSECUTION

The Sixth Amendment guarantees a defendant "the right to a speedy and public trial." U.S. Const. amend. VI. While the speedy trial right "does not have a fully documented historical pedigree," Susan N. Herman, *The Right to a Speedy and Public Trial* 161 (Praeger 2006), the amendment's known history supports the conclusion that its purpose is to constrain government actors, not defense counsel.

The right's "first articulation in modern jurisprudence appears to have been made in [the] Magna Carta." *Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967). Following the Magna Carta, "[s]pecial writs and commissions were issued, under which the jails were cleared several times a year." Herman, *The Right to a Speedy and Public Trial* at 162. Thirteenth century "justices, armed with commissions of gaol delivery and/or oyer and terminer" then regularly visited the jails to provide "speedy justice" to the accused. *Klopfer*, 386 U.S. at 223-24. When justice was delayed, some officials were "sanctioned for detaining prisoners for too long, or without proper authority." Herman, *The Right to a Speedy and Public Trial* at 163.

This Court's speedy trial jurisprudence has accordingly focused on government actors. In *United States v. Marion*, 404 U.S. 307, 313 (1971), for example, the Court held that the Sixth Amendment speedy trial right "would appear to guarantee to a criminal defendant that the Government will move with the dispatch that is appropriate to assure him an early and proper disposition of the charges against him." In *Barker v. Wingo*, 407 U.S. 514, 527 (1972), the Court held that the speedy trial right applies to actions taken by "the State." This Court has subsequently concluded that *Barker* "developed a test to determine when Government delay has abridged the right to a speedy trial." *United States v. $8850 in United States Currency*, 461 U.S. 555, 564 (1983); *cf. Doggett v. United States*, 505 U.S. 647, 651 (1992) (noting that the speedy trial analysis focuses, in part, on "whether the government or the criminal defendant is more to blame for that delay").

In the decision below, however, the Vermont Supreme Court held that the Speedy Trial Clause can also be violated by public defenders. The court concluded that because "the defender general's office is part of the criminal justice system and an arm of the state," delays attributable to public defenders "must be attributed to the state," even if "most of the delay was caused by the inability or unwillingness of assigned counsel to move the case forward." Pet. App. 5, 27-28a.

The problem with this approach is that public defenders are not government actors. Nothing in the

text of the Sixth Amendment suggests that they are, and nothing in the Sixth Amendment's history suggests that they were originally regarded as such. *Cf. Tower v. Glover*, 467 U.S. 914, 921 (1984) (noting that the "first public defender program in the United States was reportedly established in 1914").

In other contexts, however, this Court has repeatedly held that public defenders are not government actors. In *Ferri v. Ackerman*, 444 U.S. 193 (1979), for example, the Court held that federal law does not immunize a public defender against suit for legal malpractice. The Court rejected the claim that a public defender has the same "responsibilities" as "other officers of the court" such as "the judge, the prosecutor, and the grand jurors." *Id.* at 202. Echoing *Barker*, this Court held that "[a]s public servants, the prosecutor and the judge represent the interest of society as a whole." *Id.* at 202-03; *cf. Barker*, 407 U.S. at 527 (holding that "society's representatives," not "the defendant," have an obligation to bring the defendant to trial). The public defender's "principal responsibility," however, is "to serve the undivided interests of his client. Indeed, an indispensable element of the effective performance of his responsibilities is the ability to act independently of the government and to oppose it in adversary litigation." *Ferri*, 444 U.S. at 204.

Far from being an agent of the government, a public defender actually has a "particular professional obligation . . . to be an adversary of the State." *West v. Atkins*, 487 U.S. 42, 52 (1988). In *Polk County*

v. Dodson, 454 U.S. 312 (1981), the Court therefore held that a public defender does not act under color of law for purposes of § 1983. The Court explained that a public defender "characteristically opposes the designated representatives of the State" and "serves the public, not by acting on behalf of the State or in concert with it, but rather by advancing the undivided interests of his client." *Id.* at 318-19 (quotations and citation omitted).

The fact that public defenders rely on public funding does not change this. In *Polk County*, 454 U.S. at 321, the Court held that while the government's administrative decisions may affect "the quality of [a public defender's] law library or the size of his caseload," the public defender cannot become "the servant of an administrative superior." Instead, though public defenders are funded by the government, they must still retain the freedom to act as "the State's adversary." *Id.* at 322-23 n.13. The ABA's standards reflect this, stating that the "Government['s] responsibility to fund the full cost of quality legal representation for all eligible persons" should "[u]nder no circumstances" permit it to "interfere with or retaliate against professional judgments made in the proper performance of defense services." ABA Standards for Criminal Justice: Providing Defense Services 5-1.6 (3d ed. 1992).

The possibility that some public defender offices might be under-funded does not transform public defenders into government actors. Under ABA standards, public defenders already have an obligation to

"reduce their pending or projected caseloads" whenever "the acceptance of additional cases . . . will lead to the furnishing of representation lacking in quality or to the breach of professional obligations." ABA Standards for Criminal Justice: Providing Defense Services 5-5.3 (3d ed. 1992). If public defenders cannot do this, they are directed to "refus[e] . . . further appointments." *Id.* Once a public defender accepts appointment to a case, however, he has the same obligations as a privately-retained attorney. Inadequate funding does not transform his role in the adversarial system.

The critical issue is not the public defender's funding, but rather the public defender's position. *Barker*'s speedy trial analysis was predicated on the idea that "society's representatives" are charged with enforcing the government's speedy trial obligations. *Barker*, 407 U.S. at 527. Public defenders, however, are not society's representatives. They are not elected by the public or subject to retention elections. They do not have a duty to represent the public's interests, but instead only have a duty to represent their individual client's interests.

The decision below thus rests on the false premise that a public defender can simultaneously act as an arm of the state and an adversary of the state in the same proceeding. But the "very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *United States v. Cronic*, 466 U.S.

648, 655 (1984) (quotations and citation omitted). "[I]f the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." *Id.* at 656-57.

Although the government funds public defender offices, it does not control public defenders. This Court should therefore reject the Vermont Supreme Court's assertion that the government can lose its ability to prosecute a criminal based on the "unwillingness" of a public defender to "move the case forward." Pet. App. 28a. The actions of public defenders should not be attributed to the government for purposes of the Speedy Trial Clause.

II.

THE DECISION BELOW DRAWS A NEW LINE BETWEEN THE SPEEDY TRIAL RIGHTS OF INDIGENT AND NON-INDIGENT DEFENDANTS

Prior to the decision below, public defenders and privately-retained defense counsel filled the same constitutional role. In *Ferri*, for example, the Court held that "the primary office performed by appointed counsel parallels the office of privately retained counsel." *Ferri*, 444 U.S. at 204. Chief Justice Burger observed that "defense counsel who is appointed by the court . . . has exactly the same duties and burdens and responsibilities as the highly paid, paid-in-advance criminal defense lawyer." Chief Justice Warren Burger, *Counsel for the Prosecution and*

Defense – Their Roles Under the Minimum Standards, 8 Am.Crim.L.Q. 2, 6 (1969). And under ABA standards, "[o]nce representation has been undertaken, the functions and duties of defense counsel are the same whether defense counsel is assigned, privately retained, or serving in a legal aid or defender program." ABA Standards for Criminal Justice: Prosecution and Defense Function 4-1.2(h) (3d ed. 1993).

The Vermont Supreme Court's decision changes this. As discussed above, the decision is premised on the assumption that because the government has an obligation to provide counsel to indigent defendants, a public defender is an "arm of the state" for speedy trial purposes. Pet. App. 5a. But the government does not have an obligation to provide counsel to non-indigent defendants. Privately-retained counsel therefore are not an arm of the state under the Vermont rule, and delays caused by privately-retained counsel would not count against the government for speedy trial purposes. The decision below thus creates different speedy trial rules for indigent and non-indigent defendants.

If accepted by this Court, this decision would change the way prosecutors pursue cases against indigent defendants. Prior to this decision, prosecutors could stipulate to a request for a continuance without fear of violating the defendant's speedy trial rights. In *Barker*, for example, the Court held that a defendant waives his right to a speedy trial if a "delay is attributable" to him. *Barker*, 407 U.S. at 529.

Lower courts have interpreted this to mean that a defendant waives his speedy trial right whenever he or his counsel stipulates to a continuance: "The fact that accused or his counsel consents or acquiesces to a continuance, or that his trial be set beyond the period prescribed by statute, is in effect a waiver of his constitutional and statutory right, and he may not complain that he was denied a speedy trial." R.P. Davis, *Waiver or Loss of Accused's Right to Speedy Trial*, 57 A.L.R.2d 302 § 9[a] (1958 and Supp. 2008).[1]

If delays that are requested by public defenders count against the government for speedy trial purposes, however, prosecutors and courts will have an incentive to oppose or deny such requests in order to avoid dismissal under the Speedy Trial Clause. *Cf. Strunk v. United States*, 412 U.S. 434, 438-40 (1973) (holding that the only remedy for a speedy trial violation is dismissal with prejudice). The unintended consequence of this approach will be indigent defendants who are prematurely rushed to trial in order to foreclose potential speedy trial claims.

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[1] This approach is consistent with this Court's jurisprudence in related contexts. For example, in *New York v. Hill*, 528 U.S. 110, 115 (2000), this Court held that a defendant's attorney can temporarily waive the defendant's statutory right to a speedy trial under the Interstate Agreement on Detainers. According to this Court, the "agreement by counsel generally controls" when dealing with "[s]cheduling matters" such as continuance requests. *Id.*

Ironically, this danger was foreseen by the only known objection to the Speedy Trial Clause during the original congressional debates. This objection "came from a Representative concerned lest trial be so speedy that an accused not have an opportunity to secure witnesses material to his defense." *Dickey v. Florida*, 398 U.S. 30, 41 n.2 (1970) (Brennan, J., concurring). Specifically, Representative Burke of South Carolina objected to the clause because of his concern that it would lead to "overly speedy proceedings" that would "disadvantage" the defendant. Herman, *The Right to a Speedy and Public Trial* at 166-67.

If the decision below is accepted by this Court, Representative Burke's fear would likely become a reality for indigent defendants. This would not only impair the rights of the defendants in such cases, but also those of society as a whole. *See Barker*, 407 U.S. at 521 n.15 (recognizing that a "requirement of unreasonable speed would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself") (quotations and citation omitted).

But the Constitution does not require – and indeed may not even permit – the criminal justice system to try indigent defendants more speedily than non-indigent defendants. Rather than embracing this approach, this Court should instead hold that regardless of whether a defendant is represented by appointed counsel or privately-retained counsel, delays that are attributable to the defendant or his attorney

do not count against the government for purposes of the Speedy Trial Clause.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Vermont Supreme Court.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

STATE OF VERMONT,
Petitioner,

v.

MICHAEL BRILLON,
Respondent.

On Writ of Certiorari to the Vermont Supreme Court

BRIEF OF *AMICI CURIAE* VERMONT NETWORK AGAINST DOMESTIC AND SEXUAL VIOLENCE *et. al.*, IN SUPPORT OF PETITIONER

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INTEREST OF AMICI [1]

The Vermont Network Against Domestic and Sexual Violence and the other Amici listed in the Appendix are non-profit organizations devoted to remedying domestic and sexual violence through legal, legislative, and policy initiatives, as well as organizations providing shelter, advocacy, and legal counseling services to survivors of domestic and sexual violence. Amici are particularly concerned that if permitted to stand, the Vermont Supreme Court decision will frustrate the ability to prosecute domestic and sexual violence cases, subject victims and their children to increased coercive abuse, compromise public safety, and ultimately undermine the integrity of the criminal justice system.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici draw to the Court's attention the impact that its ruling will have on victims of domestic and sexual violence.[2] Estimates of the number of American women

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[1] Pursuant to S. Ct. R. 37.3(a) and 37.6, the undersigned represents that (1) all parties consented to the filing of this brief, (2) no counsel for any party authored this brief in whole or part, and (3) no person or entity other than the above-named *amici curiae* and their counsel made a monetary contribution to the preparation or submission of this brief.

[2] Amici define domestic and sexual violence as the physical, sexual, psychological and/or emotional abuse and coercive control of a victim by her intimate partner, with the goal of asserting and maintaining power and control over the victim. *See, e.g.*, Evan Stark, *Coercive Control: How Men Entrap Women In Personal Life* 5 (2007); Nichole Miras Mordini, Note, *Mandatory State Interventions for Domestic Abuse Cases: An Examination of the Effects on Victim Safety and Autonomy*, 52 Drake L. Rev. 295, 300 (2004). Although such violence does occur in same-sex relationships and can be committed by women, the vast majority

assaulted and/or raped each year by an intimate partner range from 1.5 million to 4 million.[3] An increasing number of domestic and sexual violence cases are prosecuted as the criminal justice system continues to make progress in addressing them as serious crimes. The Vermont Supreme Court ruling undermines this progress by giving incentive to defendants and their counsel to strategically delay proceedings with the hope that the victim will decide not to proceed, or that the case will be dismissed for lack of a speedy trial. It further encourages defendants to continue their abusive behaviors towards victims by manipulating the court system.

As this Court set forth in *Barker v. Wingo*, the right to a speedy trial must be evaluated in light of public concerns as well as the constitutional rights of criminal defendants. *Barker v. Wingo*, 409 U.S. 514 (1972). "[T]here is a societal interest in providing a speedy trial which exists separate from, and at times

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of domestic violence victims are women and their attackers are men. *See, e.g.*, Callie Marie Rennison, Bureau of Justice Statistics, U.S. Dep't of Justice, *Crime Data Brief: Intimate Partner Violence, 1993-2001* 1 (2003) (reporting that women are 85% of victims). Therefore, Amici use gender-specific terminology to reflect the vast majority of these cases.

[3] *See* Patricia Tjaden & Nancy Thoennes, Nat'l Inst. of Justice & Ctrs. for Disease Control & Prevention, *Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women: Findings from the National Violence Against Women Survey* iv (2000); *see also* American Psychological Ass'n, *Violence and the Family: Report of the American Psychological Association Presidential Task Force on Violence in the Family* 10 (1996). At least half of all women murdered in the United States are killed by an intimate partner. Violence Pol'y Center, *When Men Murder Women: An Analysis of 2003 Homicide Data* 3 (2005) (92% of female victims murdered by someone they knew; 62% killed by husbands or intimate partners).

in opposition to, the interests of the accused." *Id at* 519. Because it is often in the interest of criminal defendants and their counsel to delay trial, this Court has unequivocally held that courts must evaluate a defendant's speedy trial claim with particular attention to the context of the case. "The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice." *Id.* at 522 (citing *Beavers v. Haubert*, 198 U.S. 77, 87 (1905)).

The Vermont Supreme Court committed two fatal errors in *State v. Brillon*, 2008 VT 35, ¶ 2, 955 A.2d 1108. First, it, failed to account for the particular facts of the case as required by *Barker*. The factual record, which the court never examined in detail, contains overwhelming evidence that the delays during the first two years defendant was in custody were the result of defendant's own manipulation of the criminal justice system, including his desire to further "trash the victim." (J.A. 77). He fired three of his six attorneys, in part because they did not engage in arguably unethical discovery that would have dissuaded the victim from proceeding. (J.A. 67, 69, 72). Brillon even threatened the life of one of his attorneys, turning his abusive behavior on the court itself. (J.A. 69). But for the defendant's own delays, the case could have been tried within six months of his arrest.[4] At no time did the prosecution request a

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[4] Brillon was arrested on July 27, 2001, following an alleged assault on Michelle Tatro. (J.A. 66). The original date for a jury draw was in February 2002. (J.A. 67). At that time, Brillon's attorney, Richard Ammons, requested a continuance until April 2002. (J.A. 164). The court refused to grant the continuance, and Brillon immediately fired Ammons. (J.A. 187). Ammons was

continuance, nor was there any evidence in the record that the delays were a result of an under-resourced public defender system.[5] The only way for courts to distinguish between delays caused by failure of the state-operated public defender system to provide effective counsel in a timely manner and delays caused by the defense is to undertake a detailed factual examination as required by *Barker*. The Vermont Supreme Court relied almost entirely on conjecture, not facts, when accounting for the reasons for delay.

Furthermore, the Vermont Supreme Court failed to account for public concerns. In domestic and sexual violence cases, there is a particularly high risk that defendants will manipulate the court system and attempt to further control and harass victims. Michael Brillon is a habitual domestic offender with fourteen prior convictions, including a felony sexual assault of a minor. *Brillon*, 2008 VT 35, ¶ 74 (Burgess, J., dissenting). Unfortunately, Brillon's behavior is all too typical of domestic and sexual offenders. The kinds of delays and abusive behavior he exhibited can significantly impact a victim's life physically, emotionally, and financially. Such delays also make it less likely a victim will decide to proceed with a criminal case. If this ruling is allowed to stand, defendants and their counsel will have increased

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later given permission to withdraw. (J.A. 202). But for Brillon's actions, this case would have been tried in February 2002.

[5] In a subsequent news report following the *Brillon* decision, the Vermont Defender General Matthew Valerio stated that "the problems that delayed the case were unique to the Brillon situation and not systemic." Louis Porter & Patrick McArdle, *High Court to Revisit Brillon Decision*, Rutland Herald, Oct. 2, 2008 at B5.

incentive to use delay tactics with the hope that either the case will be dismissed because the victim no longer wishes to participate or that the case will be dismissed for lack of a speedy trial. This will likely result in fewer domestic and sexual violence cases being prosecuted and will compromise the public safety by releasing dangerous defendants like Brillon back into society.

Ultimately, what is at stake in this decision is the integrity of the criminal justice system itself. The Court must demand that both the prosecution and the defense litigate cases in a manner that upholds that integrity, and must refuse to give incentive or reward behaviors that undermine it. This Court has held that it is improper for the prosecution intentionally to delay "to gain some tactical advantage over [defendants] or to harass them." *United States v. Marion*, 404 U.S. 307, 325 (1971). *See Pollard v. United States*, 352 U.S. 354, 361 (1957). This Court has also held that "while defendants have no duty to assist the State in proving their guilt, they *do* have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system." *Davis v. Washington*, 547 U.S. 813, 833 (2006) (emphasis in original). Thus, it is also improper for the defendant or his counsel to intentionally delay a case to gain some tactical advantage over the prosecution or to harass victims. When the defense acts improperly, resulting delays should never serve as the factual predicate for a speedy trial claim.

Therefore, Amici respectfully request that the Court vacate the decision, or in the alternative, remand with clear instructions that the court should undertake a more thorough examination of the reasons for the delays, the context of the case, and the interests

of public justice as required by *Barker*. The Court should further clarify that delays caused by the defendant and/or his counsel cannot serve as the factual predicate for a speedy trial claim unless those delays had nothing to do with the defendant's own conduct and were instead the result of the inability or unwillingness of the state public defender system to provide adequate counsel in a timely manner. Finally, Amici urge the Court to alert the trial and appellate courts to the particular risks of defense delay tactics in domestic and sexual violence cases and the consequences of those delays on victims, the public, and the criminal justice system.

ARGUMENT

I. DOMESTIC AND SEXUAL VIOLENCE OFFENDERS AND THEIR COUNSEL COMMONLY ENGAGE IN DELAY TACTICS TO DISCOURAGE VICTIMS FROM PARTICIPATING AND TO MANIPULATE THE CRIMINAL JUSTICE SYSTEM TO THEIR STRATEGIC ADVANTAGE.

This Court has recognized that domestic and sexual offenders often use both physical and psychological coercion to discourage their victims from seeking outside assistance. For example, in *Giles v. California*, this Court recognized that "[a]cts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions." *Giles v. California*, 128 S. Ct. 2678, 2692 (2008). Furthermore, in *Davis* this Court held that domestic violence cases are "notoriously susceptible to intimidation or

coercion of the victim to ensure that she does not testify at trial." *Davis*, 547 U.S. at 833.

Such coercion and intimidation does not end upon arrest. Empirical research and experience show that many domestic and sexual offenders continue to engage in behavior intended to dissuade victims from participating in criminal proceedings as well as manipulate the legal system to gain strategic advantage. Such behavior further harms victims and their children and decreases the likelihood that victims will participate with the state in holding their abusers accountable. When defendants manipulate the court system to coerce and control their victims, the court system not only becomes complicit in the defendant's abuse, but also becomes the target of the defendant's abusive behavior.

Although the criminal justice system focuses primarily on the physical harms caused by offenders, research and experience show that offenders use a host of tactics to exert coercion and control over victims beyond physical and sexual violence.[6] Most victims are subjected to an ongoing strategy of intimidation and control intended to deny them of their autonomy and liberty.[7] Researchers, legal scholars,

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[6] *See* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 Mich. L. Rev. 1, 93 (1991) ("[B]attering is power and control marked by violence and coercion."); Deborah Turkheimer, *Recognizing and Remedying the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. Crim. L. & Criminology 959, 964–65 (2004); Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 Hofstra L. Rev. 1191, 1204–06 (1993); Karla Fischer, Neil Vidmar & Rene Ellis, *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. Rev. 2117, 2126–29 (1993).

[7] *See generally* Stark, *supra* note 2.

advocates, and the federal government have all come to understand that domestic and sexual abusers disempower and control their victims by engaging in a range of behaviors including: emotional abuse, economic control, psychological intimidation, social isolation, and threats to and about the children or other family members.[8] For these offenders, maintaining control over every aspect of the victim's life is their primary motivation.

The ability to control one's targeted victim is frustrated by state intervention. Indeed, state interven-

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[8] *See* Turkheimer, *supra* note 6, at 964–65; Dutton, *supra* note 6, at 1204–06; Fischer *et al.*, *supra* note 6, at 2126–29 (describing batterer and victim as "the Ruler and the Ruled"); Robert Geffner, Peter G. Jaffe & Marlies Sudermann, *Children Exposed to Domestic Violence: Current Issues in Research, Intervention, Prevention, and Policy Development* 330 (2000) ("The working definition of domestic violence used in this article is the deliberate use of threats, violence, and other types of abuse in intimate teen or adult relationships in order to exert power and control over the victim."); Jalna Hanmer & Catherine Itzin, *Home Truths About Domestic Violence: Feminist Influences on Policy and Practice: a Reader* 314 (2000) ("Controlling behavior was conceptualized as a continuum which ranged from physical violence and intimidation to overt psychological and economic abuse to more subtle forms of psychological control . . ."); Evan Stark, *Mandatory Arrest of Batterers, in Do Arrests and Restraining Orders Work?* 115, 121 (Eve S. Buzawa & Carl G. Buzawa eds., 1996) ("In trying to conceptualize battering, we need to picture ongoing forms of control that are at once both personal and social."); National Institute of Justice, *Do Batterer Intervention Programs Work? Two Studies* 2 (2003), *available at* http://www.ncjrs.gov/pdffiles1/nij/200331.pdf ("[A] power and control wheel illustrates tactics abusers use to control their partners."); Peter G. Jaffe, Nancy K. D. Lemon & Samantha E. Poisson, *Child Custody and Domestic Violence: A Call for Safety and Accountability* 39 (2003) ("At the core of domestic violence is the abuse of power and control.").

tion can be among the most dangerous situations for victims, who become at increased risk for retaliatory abuse. At least 30% of domestic offenders assault their victims while awaiting trial on a prior violent incident.[9] Thus, many offenders do everything they can to avoid accountability for their illegal behavior, including keeping their victims from accessing outside help.[10]

In addition to retaliatory violence, domestic and sexual violence offenders often use the legal system to retaliate against their victims.[11] Once a defendant

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[9] Andrew King-Ries, *Forfeiture by Wrongdoing: A Panacea for Victimless Domestic Violence Prosecutions*, 39 Creighton L. Rev. 441, 443 n.14 (2006) (citing Randal Fritzler & Leonore Simon, *Creating a Domestic Violence Court: Combat in the Trenches*, 37 Ct. Rev. 28, 28–33 (2000)).

[10] *See* James Ptacek, *Battered Women in the Courtroom: The Power of Judicial Responses* 74–85 (1999) (detailing tactics used to keep victims from turning to outside help and tactics used to retaliate against victims for doing so); Tom Lininger, *Prosecuting Batterers After Crawford*, 91 Va. L. R. 747, 768–69 (2005) (citing a study that found that half of all victims suffered threats of retaliation for seeking outside assistance).

[11] *See* Roberta Valente, *Screening Guidelines, in The Impact of Domestic Violence on Your Legal Practice: A Lawyer's Handbook* 51, 54 (Margaret B. Drew et al. eds., 2d ed. 2004) ("Many batterers use the legal system to punish their partners for taking steps to free themselves from domestic violence."); Susan L. Keilitz et al., *Domestic Violence and Child Custody Disputes: A Resource Handbook for Judges and Court Managers* 3 (1997) ("An abuser also may engage in delay tactics or file motions to increase costs, wear down his partner's resolve to leave the relationship, and remain in a position of power over her."); Joan Zorza, *Batterer Manipulation and Retaliation in the Courts: A Largely Unrecognized Phenomenon Sometimes Encouraged by Court Practices*, 3 Domestic Violence Rep. 67, 68–75 (1998) (detailing tactics domestic abusers use in manipulating the court system); Leigh Goodmark, *Law is the Answer? Do We*

is facing criminal charges, he is even more likely to use these tactics to control the victim and dissuade her from continuing to participate in court proceedings.[12] This is particularly true if, as in Brillon's case, he is in state custody pending trial. Then, the only means by which to exert coercion and control over one's victim is to use psychological tactics, including trial manipulation. Such tactics satisfy the defendant's need to continue to dominate the victim's life and to avoid accountability.

The complete record in this case indicates that the defendant engaged in precisely the kind of coercive manipulation so common among domestic and sexual offenders. The facts serve as an illustration of the kind of tactics defendants and sometimes their counsel undertake. Petitioner's brief sets forth the facts in detail and thus Amici will highlight those which demonstrate the broader pattern of coercive manipulation evident throughout the criminal justice system in domestic and sexual violence cases.

There is ample evidence in the record that Brillon intentionally engaged in delay tactics calculated to manipulate the court system and to discourage the

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Know for Sure? Questioning the Efficacy of Legal Interventions for Battered Women, 23 St. Louis U. Pub. L. Rev. 7, 32–35 (2004) (describing how abusers manipulate the court system to revictimize); Lundy Bancroft, *Why Does He do That? Inside the Minds of Angry and Controlling Men* 291–314 (2002) (detailing how abusers manipulate the court system).

[12] Goodmark, *supra* note 11, at 33–34 (describing how batterers file repeated motions to harass or take revenge on victims and noting that "batterers use the legal system to abuse their victims when they can no longer reach them by other means"); Stark, *supra* note 2, at 56–57 (describing how legal interventions lead abusers to supplant physical violence with other forms of coercive control).

participation of his victim Michelle Tatro. He fired three of his six attorneys, each time claiming that they were inadequately representing him. However, a closer examination of the record reveals that he likely fired them because they refused to engage in arguably unethical behavior designed to "trash" the victim and dissuade her from proceeding with the case. (J.A. 217–18). Brillon tried to fire his first attorney, Richard Ammons, just four days before trial. (J.A. 68). The trial court then allowed Ammons to withdraw after he cited "irreconcilable differences in preferred approach between Mr. Brillon and counsel as to trial strategy, as well as other legitimate legal decisions." (J.A. 104). Ammons also was concerned "whether it would be ethically appropriate" for him to continue representation. (J.A. 170). Although the trial court made some inquiry into the reasons for Ammons's request to withdraw, it did not go into sufficient detail with Ammons over these differences in "trial strategy." However, the court did acknowledge that it could not require Ammons to violate his "ethical obligations." (J.A. 198–99).

Brillon's third lawyer, Gerard Altieri, was far more forthcoming with the court as to the reasons why Brillon attempted to fire him. Altieri shared with the court that Brillon wanted "for me to somehow bring in a lot of people . . . I don't want to use the words trash, but impeach Mrs. Tatro. I'm not sure that stuff is admissible." (J.A. 217). Altieri continued, "[a]nd you have seen me try complex cases before and I'm willing to work with the man, but I cannot do a lot of things he wants me to do, and I am not the first attorney he's fired." (J.A. 218). Altieri further stated that "if Mr. Brillion wants me to go on a fishing expedition and haul in people and relatives just to trash his wife, I don't think a judge is going to allow

me to do that. At least not in front of the cases I've tried downstairs. And if it's not relevant, I think it could hurt the case potentially in front of a jury." (J.A. 218). When Altieri agreed to stay on the case, Brillon threatened his life. Altieri informed the court that Brillon said, "If it takes me 20 years, to get even with you, I'll get you." (J.A. 224). After advising Brillon that his right to counsel did not include the right to manage every aspect of the strategy of the case, the court allowed Altieri to withdraw. (J.A. 228).

Subsequently, Brillon fired his fourth attorney, Paul Donaldson, just before yet another scheduled trial. (J.A. 237–38). Brillon again filed a *pro se* motion with the court seeking Donaldson's dismissal for lack of adequate representation. (J.A. 115–16). The court allowed Donaldson to withdraw without making any inquiry as to whether, in fact, his representation had been inadequate. (J.A. 240).

Brillon's actions towards his attorneys suggest that the delays were calcuated to game the system and discourage Tatro's participation. Indeed, in Brillon's motion to dismiss for lack of a speedy trial, he claimed prosecutorial misconduct related to newly discovered evidence that the victim did not want to press charges against him. (App. to Pet. Cert 68). Brillon faced an almost certain conviction unless Tatro decided not to proceed with the case. Brillon's behavior suggests that he hoped to wear down Tatro's resolve by insisting his attorneys engage in unethical discovery. When Brillon's counsel refused to do so, he fired them.

Furthermore, there is evidence in the record to suggest that at least two of Brillon's attorneys requested delays to gain a strategic advantage on be-

half of their client. Ammons, the first attorney, requested that the initial trial judge, Karen R. Carroll, recuse herself because she was familiar with Brillon from a family law matter. (J.A. 66–67). When she denied the request, Ammons sought a continuance until Judge Carroll had rotated out of the county. (J.A.174). Given that all depositions were taken, including two from the victim, there seemed to be no reason for the requested continuance but to have a more favorable judge. In addition, Ammons also requested a continuance to engage in discovery concerning Tatro's alleged use of prescription medication. (J.A. 167–68). It appeared that Ammons was on a "fishing expedition" to dig up any evidence he could to embarrass and harass Tatro. (J.A. 178). The court denied the request, suggesting that the defense had ample time to do discovery and that this evidence was likely not exculpatory for the defendant. (J.A. 186–87).

Donaldson, the fourth attorney, also asked for additional time at a status conference, prior to yet another scheduled trial, to depose last-minute witnesses who would attack the victim's character. *Brillon*, 2008 VT 35, ¶ 25. Arguably, this was the same discovery that Altieri refused to undertake. The trial court noted that these were peripheral character witnesses. *Id.* Again, this request was likely intended to harass the victim and discourage her participation. The court requested the list of these witnesses, but Brillon fired Donaldson, who was allowed to withdraw from the case before providing the court with the requested names. *Id.*

Defense attorneys certainly have a duty to engage in zealous representation of their clients. But it is important to highlight that this was a simple assault

case. Defense counsel took twelve depositions, including two from Tatro. (J.A. 167–68). At the actual trial, the defense called no witnesses. There was no reason for the requested delay or any reason for the additional discovery after February 2002, but to postpone the case with the hope that the victim would no longer proceed. While defense counsel certainly can request such delays, if granted, these delays should never serve as a factual predicate for a speedy trial claim. Otherwise, there is every incentive for counsel to engage in needless discovery and continuances.

II. DELAYS BY DEFENDANTS AND THEIR COUNSEL ADVERSELY IMPACT VICTIMS AND UNDERMINE THE ABILITY OF THE CRIMINAL JUSTICE SYSTEM TO EFFECTIVELY PROSECUTE DOMESTIC AND SEXUAL VIOLENCE CASES.

Tatro did proceed with the case and a jury found Brillon guilty. *Brillon*, 2008 VT 35, ¶ 30. He was sentenced to twelve to twenty years based on his status as a habitual domestic violence offender. *Id.* However, many victims do not proceed with criminal prosecution. The kinds of delays and tactics Brillon and other offenders engage in can significantly impact a victim's life physically, emotionally, and financially. Criminal defendants and their counsel are well aware that if a victim decides not to participate in a criminal proceeding, then the most likely result is dismissal.[13] Proactive and aggressive

[13] Cheryl Hanna, *No Right to Choose: Mandated Participation in Domestic Violence Prosecutions*, 109 Harv. L. Rev. 1849, 1892–93 (1996) (describing the ways in which defense attorneys encourage victims not to participate in criminal proceedings).

prosecution of domestic and sexual violence has become the norm, strongly encouraged by federal and state governments.[14] If defendants and their counsel can use the kinds of delay tactics Brillon engaged in to serve as a factual predicate for speedy trial claims, then the progress that has been made in this area will be frustrated. Most cases like Brillon's will not make it to trial because victims will decide that it is no longer in their best interests to proceed. This loss of faith in the judicial system compromises the rights of victims and fails to adequately protect the public from domestic and sexual violence offenders.

Delayed trials impact victims in a multitude of ways. Most significant is the risk of retaliatory violence. Abusive trial tactics, especially those sanctioned by the court, demonstrate to the victim that the abuser will be able to perpetuate abuse against her and potentially escalate his violent acts if he is

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[14] *See* Jeffrey Fagan, National Institute of Justice, *The Criminalization of Domestic Violence: Promises and Limits* 1 (1996), *available at* http://www.ncjrs.gov/pdffiles/crimdom.pdf ("During the past 30 years, the criminalization of domestic violence has developed along three . . . tracks: criminal punishment and deterrence of batterers, batterer treatment, and restraining orders designed to protect victims through the threat of civil or criminal legal sanctions."); *see generally* Emily Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 Wisc. L. Rev. 1657 (2004) (describing the shift towards aggressive prosecution); Press Release, Dep't of Justice Violence Against Women Office, Justice Department Funds Community Initiatives to Treat Domestic Violence as a Crime (Sept. 15, 1998), *available at* http://www.ojp.usdojgov/press releases/1998/VAW98204.htm; International Association of Chiefs of Police, *Model Policy: Domestic Violence* (2006), http://www.theiacp.org/documents/pdfs/RCD/IACPDomesticViolencePolicy.pdf (urging equal treatment of domestic assaults and calling for non-arrest decisions to be justified).

released from prison. Because victims of domestic and sexual violence remain very much at risk after separation or reporting of their abuse, and because the legal system has often failed to protect them, many victims are ambivalent or fearful about prosecution. It is estimated that such victims recant or decide not to cooperate with the prosecution approximately 80-90% of the time.[15] A study in New York City found that 80-90% of victims decide not to cooperate in domestic violence cases.[16] In the 1980s and 1990s, as many as 60-80% of domestic violence cases were abandoned for this reason.[17] In Brooklyn and Milwaukee, the most common reason for dismissal of domestic violence prosecutions was a victim's decision not to appear in court or to testify against the defendant.[18]

Research has shown that delays in trial discourage victims from participating in the prosecution of their abusers. For example, a study of specialized domestic violence courts in Milwaukee, Wisconsin found that if cases were efficiently processed, then conviction rates

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[15] Tom Lininger, *supra* note 10, at 768; Douglas E. Beloof & Joel Shapiro, *Let the Truth Be Told: Proposed Hearsay Exceptions to Admit Domestic Violence Victims' Out of Court Statements as Substantive Evidence*, 11 Colum. J. Gender & L. 1, 3–4 (2002).

[16] Richard R. Peterson, *Combating Domestic Violence in New York City: A Study of DV Cases in the Criminal Courts, CJA Final Report* 9–10 (2003), http://www.nycja.org/research/reports/ressum43.pdf.

[17] Lininger, *supra* note 10, at 771 n.121.

[18] *Id.* at 769 (finding that in Milwaukee in 2005, 96% of dismissals occurred because victims did not appear in court for trial).

increased.[19] Milwaukee officials found that reducing the time it took for a case to go to trial resulted in fewer defendants threatening or harming victims.[20] Research has also found that specialized courts that understand the context of domestic violence are less likely to allow defendants to manipulate the system and thus more likely to hold abusers accountable for their behaviors.[21] Victims are more likely to decide that it is to their benefit to go forward with a case when there are fewer opportunities for abusers to prolong the judicial process.

Victims also experience continued psychological abuse when cases are continually delayed and can be re-traumatized when the legal system appears indifferent or hostile. "The common denominator of psychological trauma is a feeling of 'intense fear, helplessness, loss of control, and threat of annihilation.'"[22] Deliberate delay tactics continue coercive control over victims.[23] Victims remain in fear pending disposition of a case and can be overwhelmed by mental and emotional distress. They can also experience heightened fear and anxiety if they see that no one, not even judges, can stop the abuse. A victim continues to be abused by manipulative delay tactics,

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[19] Robert C. Davis et al., *Prosecuting Domestic Violence Cases with Reluctant Victims: Assessing Two Novel Approaches in Milwaukee, Executive Summary* 1 (1997).

[20] *Id.* at 7.

[21] Sack, *supra* note 14, at 1730–31 (finding that coordinated community responses to domestic violence, which include specialized courts and judicial training, decrease delays as well as batterer manipulation of the legal system).

[22] Judith Herman, *Trauma and Recovery: The Aftermath of Violence—from Domestic Abuse to Political Terror* 33 (1992).

[23] Peter G. Jaffe et al., *supra* note 8, at 32.

even if she no longer is hit, battered, or raped by the defendant.

Continued abuse through trial tactics is of particular concern when victims are subjected to needless and irrelevant discovery of the type Brillon encouraged his attorneys to undertake. As noted above, Ammons requested a continuance to engage in discovery concerning Tatro's alleged use of prescription medication. (J.A. 167–68). The court did not see how evidence that she took medication would be helpful to Brillon given that there were photographs of Tatro's injuries and evidence that she was in pain as a result of the assault. (J.A. 185–86). The trial court properly exercised its discretion by refusing to grant a continuance for irrelevant discovery. However, unless a trial court engages in a factual inquiry as to the reasons behind the requested continuance, it may be inclined to grant such requests. In doing so, a victim can become disinclined to seek medical treatment, including mental health services, for fear that her entire life will be subjected to scrutiny and ridicule. Criminal defendants certainly have a right to vigorously defend themselves. However, continuances and delays requested by the defense in the course of vigorous representation should not then serve as the basis for a speedy trial claim.

Delay tactics can also result in enormous economic hardships for a victim who must repeatedly return to court, thereby requiring her to miss employment and incur additional costs for repeated, drawn-out litigation. Criminal trial delays have a disproportionate impact on poor women, compounding their harms.

> Cooperation with prosecution often requires women to take time off from work, to acquire transportation and childcare, or to make other

> sometimes costly and difficult arrangements. Thus, women who have family or friends who will watch the children, help them with chores, or provide transportation or emergency loans, are more likely to cooperate with prosecution than women who do not have access to these informal sources of tangible support.[24]

Poverty and lack of material resources are disincentives to participate in the criminal process. Delays caused by the defendant exacerbate those barriers. "Economic abuse often plays an integral role in a batterer's coercive control tactics. Dire economic straits, in turn, increase a woman's vulnerability to future violence."[25]

Delay tactics also significantly impact the victim's ability to parent her children. This is true especially when children have witnessed violence against their mothers, as was the case here.[26] In the *Brillon* case,

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[24] Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review* 408 (2001).

[25] Barbara J. Hart & Erika A. Sussman, *Civil Tort Suits and Economic Justice for Battered Women*, 4(3) Victim Advocate: J. of the Nat'l Crime Victim Bar Ass'n 3, 6 (Spring 2004); *see also* Erika A. Sussman, *Using the Civil Protection Order as a Tool for Economic Justice*, *in* The Advocate's Quarterly: Newsletter of the Center for Survivor Agency and Justice 3(1) (2006).

[26] Peter G. Jaffe, Linda L. Baker & Alison J. Cunningham, *Protecting Children from Domestic Violence: Strategies for Community Intervention* 193 (2004) ("Roughly one-third of the states have opted to increase the penalty usually given for domestic violence if it occurs where a child hears, sees, or is aware of it, rather than create a separate crime."); *see In re Marriage of Stewart*, 137 P.3d 25, 28 (Wash. Ct. App. 2006) (finding evidence of imminent psychological harm and domestic violence where children witnessed father's domestic assault on their mother and feared continued assault).

the domestic assault that initiated the whole proceeding took place in front of Tatro's daughter. Tatro had her daughter in the car as she tried to get away from Brillon. In her attempt to leave, Brillon struck Tatro in the face. The police arrived thereafter. *Brillon*, 2008 VT 35, ¶ 8. Tatro's daughter was subjected to her mother's assault and the arrival of the police. A child's sense of security is intertwined with the parent's safety. Any child would be terrified by witnessing her mother's assault and the arrival of the police. This victimization is compounded when the case remains in limbo. The longer the trial process is drawn out, the more anxiety arises in the victim. This can subsequently affect the child. Thus, a victim often will decide to give up on the criminal process if long delays are adversely impacting her and her children. Courts need to exercise enhanced judicial oversight, especially when children are involved.[27] Delays and trial manipulation by offenders heighten the concern that children will be adversely impacted.

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[27] David A. Ford et al., *Controlling Violence Against Women: A Research Perspective on the 1994 VAWA's Criminal Justice Impacts* 47 (2002), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/197137.pdf (the National Institute of Justice "calls for enhanced judicial oversight with extensive graduated sanctions for domestic violence offenders and with comprehensive services for victims in order to increase both defendant and system accountability, to lower recidivism, and to insure victim safety").

III. THE VERMONT SUPREME COURT DECISION ENCOURAGES STRATEGIC DELAYS AND MANIPULATIVE BEHAVIOR BY DEFENDANTS AND THEIR COUNSEL AND WILL COMPROMISE THE INTEGRITY OF THE CRIMINAL JUSTICE SYSTEM.

The Court should be particularly concerned with the abusive and controlling behavior Brillon exhibited towards his attorneys, the public defender system, and the court. Indeed, the only person who seemed to be in control of the court proceedings during the first two years was Brillon himself. Domestic and sexual violence offenders operate with the goal of controlling and manipulating those around them.[28] In most circumstances, intimate partners become the target of these coercive, domineering, power-seeking techniques. Yet, those who are abusive in their personal lives often become abusive in other contexts. They seek to gain control in situations where they themselves are otherwise powerless.[29] Like Brillon, abusers may continually file motions and seek continuances, and most offensively, fire or threaten their court-appointed counsel.

The behaviors Brillon displayed are not surprising when considered in the context of someone who abuses an intimate partner. Not only did Brillon engage in abusive tactics in the case involving Tatro, but he also engaged in such tactics in other cases.

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[28] Karla Fischer *et al.*, *supra* note 6, at 2120.

[29] Andrew King-Ries, *supra* note 9, at 460; Alafair S. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 Geo. Wash. L. Rev. 552, 568–70 (2007); Susan L. Keilitz et al., *supra* note 11, at 3.

Brillon, 2008 VT 35, ¶ 58. His actions are analogous to the controlling and manipulative behavior he likely exhibited towards Tatro. Amici see evidence of domestic and sexual violence offenders' overwhelming need for control throughout the criminal justice system.

Attorneys representing abusers can also be the target of abuse from their clients. The American Bar Association Commission on Domestic Violence recommends that attorneys representing domestic abusers "heavily document" the file and engage in safety planning because the batterer may later become unhappy with the representation and take action against them.[30] Brillon's threats toward Altieri demonstrate the kinds of dangers such offenders often pose to their court-appointed counsel. While the trial court might have no choice but to allow attorneys physically threatened by their clients to withdraw, no offender should be rewarded for such behavior by allowing it to serve as the factual predicate of a speedy trial claim.

The Vermont Supreme Court ruling places public defenders at even greater risk of unwarranted manipulation by clients, including false claims of inadequate assistance of counsel. If the ruling is allowed to stand, defendants will know that firing one's attorney and thus delaying trial could eventually result in dismissal. Defendants could become increasingly difficult and uncooperative with their counsel. This makes it harder for public defenders to provide ade-

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[30] Lisa Angel & Lee Rosen, *Zealous and Ethical Representation of Batterers, in The Impact of Domestic Violence on Your Legal Practice: A Lawyer's Handbook* 83, 85 (Margaret B. Drew et al. eds., 2d ed. 2004).

quate representation and could further burden an already over-burdened public defender system. Indeed, were it not for Brillon's manipulative behaviors, the Vermont Defender General would not have had to provide six attorneys to represent him. This resulted in a tremendous expenditure of unnecessary time and resources.

The Defender General did have difficulty replacing Brillon's counsel after he fired Altieri and Donaldson. But this challenge was a direct result of Brillon's own actions. If the public defender system has difficulty finding replacement counsel due to the defendant, then those delays should not serve as the factual predicate of a speedy trial claim. Otherwise, abusive and controlling defendants like Brillon could fire as many lawyers as it takes to exhaust the system. When the public defender system can no longer keep up with the defendant's demands, the defendant's case could be dismissed. This consequence is completely antithetical to the effective administration of justice and places both the public defender system and the public's safety at risk.

The Vermont Supreme Court decision will also burden the court system, which will be no doubt inundated with requests from defendants to fire their counsel. Just following the *Brillon* decision in Vermont, two high profile murder defendants, both domestic and sexual offenders, sought to fire their court-appointed attorneys. While the motives behind the requests were unclear, observers suggested that these requests were prompted by the *Brillon* decision.[31] Word can travel quickly in jail that firing one's

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[31] Adam Silverman, *Suspects Ask to Fire Attorneys*, Burlington Free Press, April 3, 2008 at 1A; Vermont Public Radio, *Lawyer for Suspect in Murder of Va. Woman Wants off Case*,

attorney might get one's case dismissed. Unless the Court provides guidance to the lower courts that such behavior cannot serve as the factual predicate for a speedy trial claim, defendants will have additional incentive to engage in behaviors that will burden the public defender and criminal justice system.

Scholars and advocates have continued to call for the judicial system to recognize and address those behaviors by domestic and sexual offenders that undermine the integrity of the court system.[32] By allowing Brillon to continually request delays and fire, as well as threaten, his attorneys, the court itself became complicit in his further abuse of Tatro. The court became a vehicle by which Brillon could gain access to and control of Tatro. In that process, the court also became the target of Brillon's manipulations. Abusive trial tactics, especially those sanctioned by the court, demonstrate to the victim and the community that the abuser can continue his abuse and could potentially escalate his violent acts upon release. If the public sees that the criminal justice system cannot adequately control such defendants and protect victims, faith in the system itself to protect the public from domestic and sexual violence offenders is shattered.

Deprivation of the right to a speedy trial does not necessarily harm the defendant, but often works in the defendant's favor. *Barker*, 407 U.S. at 521. That

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VPR News, April 25, 2008, https://www.vpr.net/news_detail/80277/.

[32] *See* Sacks, *supra* note 14, at 1693 ("There is no doubt that the justice system urgently needs to develop a more sophisticated method both of identifying and addressing this manipulation when it exists.").

advantage is particularly salient in cases involving domestic and sexual violence. If the Vermont Supreme Court ruling is upheld, a defendant and his counsel will have every incentive to delay trials as much as possible, with the calculated hope that cases will be dismissed either because the victim decides not to participate or because the case did not proceed to trial in a timely manner. Consequently, a defendant has nothing to lose by attempting delays. If the court denies the speedy trial claim, he has still manipulated the system and possibly procured the absence of witnesses or important evidence. More importantly, he has succeeded in punishing the victim for participating in the proceedings and has discouraged future victims from seeking outside help.

This Court has steadfastly maintained that it will not tolerate actions by the defense to "game" the criminal justice system. In *Davis*, a case similar in its concern for domestic and sexual violence victims, this Court held that "while defendants have no duty to assist the State in proving their guilt, they *do* have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system." *Davis*, 547 U.S. at 833 (emphasis in original). Furthermore, in *Morris v. Slappy*, 461 U.S. 1 (1983), a rape case in which the defendant claimed a violation of his Sixth Amendment right to counsel when his first attorney fell ill and was replaced by a second attorney, this Court held:

> [I]n the administration of criminal justice, courts may not ignore the concerns of victims. Apart from all other factors, such a course would hardly encourage victims to report violations to the proper authorities; this is especially so when the crime is one calling for public testimony about a

> humiliating and degrading experience such as was involved here.

Id. at 15. This Court further emphatically stated: "A criminal trial is not a 'game.'" *Id.* In order to protect victims and support them in moving forward with a case, the Court's instructions must be clear that this sort of gaming should not be tolerated and will not result in dismissal for lack of a speedy trial.

In *Barker*, this Court clearly stated that interests of public justice must be taken into account when evaluating a speedy trial assertion. *Barker*, 407 U.S. at 519. "Federal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Wheat v. United States*, 486 U.S. 153, 160 (1988). Strategic delays, particularly when they involve the continual replacement of counsel, prevent trials from moving forward and consume the public's time and resources. Most profoundly, they undermine the public trust and confidence in the criminal justice system's ability to hold accountable those who engage in criminal wrongdoing.

IV. WHEN CONSIDERING SPEEDY TRIAL CLAIMS, COURTS MUST MAKE SPECIFIC FACTUAL FINDINGS TO DETERMINE WHETHER THE DELAYS WERE CAUSED BY THE DEFENDANT AND HIS COUNSEL OR BY THE INABILITY OR UNWILLINGNESS OF THE STATE TO PROVIDE ADEQUATE COUNSEL.

Amici agree that continuances and delays caused solely by an indigent defendant's public defender can rise to a speedy trial violation if attributable to the

inability or unwillingness of the state public defender system to appoint adequate counsel in a timely manner. Victims of domestic and sexual assault often find themselves as defendants in the criminal justice system. Indeed, 57% of female prisoners in state prisons and 40% of female prisoners in federal prisons reported that they had been physically or sexually abused before serving their sentence.[33] Thus, it is always in the best interests of victims, whether they are defendants or witnesses in a criminal case, to have adequate counsel appointed in a timely manner as required by *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). A defendant's right to assistance of counsel and right to a speedy trial are inevitably intertwined. Both are constitutional rights under the Sixth Amendment of the United States Constitution and both must be respected by the Court. Therefore, it is within a trial court's discretion

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[33] *See* National Commission on Correctional Health Care Board of Directors, *Position Statement: Women's Health Care in Correctional Settings* (1994), *available at* http://www.ncchc.org/resources/statements/womenshealth2005.html (guiding correctional administrators in the management of women's health, including effects of sexual and physical abuse of women prisoners); Lawrence A. Greenfield & Tracy L. Snell, Bureau of Justice Statistics, *Women Offenders* 1 (1999), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/wo.pdf ("Nearly six in ten women in State prisons had experienced physical or sexual abuse . . . ."); Caroline Wolf Harlow, Bureau of Justice Statistics, *Prior Abuse Reported by Inmates and Probationers* 1 (1999), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/parip.pdf (reporting physical and sexual abuse of inmates prior to admission); Tracy L. Snell & Danielle C. Morton, Bureau of Justice Statistics, *Women in Prison: Survey of State Prison Inmates* 1991 6 (1994), *available at* http://www.ojp.usdoj.gov/bjs/abstract/wopris.htm ("An estimated 50% of women in prison who reported abuse said they had experienced abuse at the hands of an intimate . . . .").

to find that a defendant's right to a speedy trial has been violated by delays caused solely by the state public defender system.

The Court, however, must provide guidance to the lower courts as to how to evaluate the specific facts and contexts of cases where delays are caused solely by the defendant and/or his counsel. The right to a speedy trial was not intended to "provide defendants with tactics for ensnaring the courts into situations where charges will have to be dismissed on technicalities." *United States v. Banks*, 27 Fed. App'x 354, 358 (6th Cir. 2001) (quoting *United States v. Cianciola*, 920 F.2d 1295, 1298–1300 (6th Cir. 1990)). When a defendant necessitates repeated continuances and waives his right to a speedy trial, as did the defendant in *Brillon*, such actions may be considered "sandbagging" and the court may find that there has been no speedy trial right violation. *Banks*, 27 Fed. App'x at 358.

Thus, while Amici agree that the state has a duty to provide criminal defendants with adequate counsel and a functioning, well-funded public defender system, we cannot agree that "tak[ing] the extraordinary step of vacating the convictions and dismissing the charges against the defendant" was the appropriate remedy in this case. *Brillon*, 2008 VT 35, ¶ 1. Ultimately, it is clear that neither the majority nor the dissent knew whether the delays in Brillon's case were attributable to his own "'monkey-wrenching' 'maneuvers'" or to a "breakdown in the public defender system." *Id.* ¶¶ 2–4. In fact, the majority readily admits that "[b]ecause of the limited record" in this case it could not be sure that Brillon's case was not an "aberration," rather than a "growing crisis" in the defender general services in the state.

Id. ¶ 3. Yet, the actual record is extensive and clearly demonstrates numerous instances of intentional delays by Brillon and his counsel, and no evidence that any delays in the first two years were a result of an under-resourced public defender system. Particularly noteworthy is that after the decision, the Vermont Defender General stated that the problems that delayed the case were unique to the *Brillon* situation and not systemic.[34] Because the Vermont Supreme Court ignored critical facts about the behavior of the defendant and his counsel, it over-stepped its authority by engaging in determinations about the functioning of the public defender system best left for the legislature.

Amici agree with the dissent that to allocate, on the meager record before the court, certain portions of the delay to the state and the defendant respectively constitutes unwarranted "appellate fact-finding." *Id.* ¶ 57. Under such circumstances, the proper remedy is to either vacate the decision or to remand the case to the trial court, as the dissent urges, so that the court can make factual findings on the cause for the delays. Releasing the defendant fails to give trial courts the necessary guidance on how to deal with defendants like Brillon in future criminal proceedings.

The only way for a court to decipher if the reasons for the delays are attributable to the state public defender system as opposed to the defendant and his counsel is to engage in specific fact finding based on the entire record. *Barker* requires such an examination precisely because of the complex nature of the right itself. *Barker*, 407 U.S. at 522. It is critically

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[34] Porter, *supra* note 5, at B5.

important for courts to undertake a specific factual inquiry in order to preserve the constitutional right to a speedy trial, while at the same time ensuring that defendants are not manipulating the court and harassing victims.

The facts from *Brillon* highlight precisely why a detailed factual inquiry is necessary at every stage at which a defendant or his counsel request a continuance or instigates some other delay. Brillon claimed three of his attorneys were inadequate, and he was ultimately successful in having each of them removed, significantly delaying his trial. (J.A. 68–69, 72). While Brillon never formally raised an ineffective assistance of counsel claim, the Vermont Supreme Court seemed to allude to the notion that Brillon's counsel had been ineffective, thus justifying dismissal of his case. "A defendant cannot be forced to choose between his right to a speedy trial and his right to effective assistance of counsel." *Brillon*, 2008 VT 35, ¶ 38. If the state public defender system had appointed Brillon incompetent counsel, the result of which was a delayed trial, then certainly his right to a speedy trial was implicated. However, neither the trial court nor the Vermont Supreme Court undertook an ineffective assistance of counsel analysis guided by *Strickland v. Washington*, 466 U.S. 688 (1984). Nor is there any evidence in the record to suggest that Brillon's lawyers failed to provide adequate representation as required by the Sixth Amendment and *Gideon*. *See also United States v. Gonzalez-Lopez*, 548 U.S. 140, 152 (2006) (the defendant's right to counsel of choice is limited by the trial court's authority to establish criteria that balances the right to counsel against the judiciary's interest in fairness).

The Vermont Supreme Court never undertook the required fact finding, and thus it could not determine whether the state violated the defendant's Sixth Amendment right, or whether the defendant forfeited any such right based on his own manipulative behavior. The only way to preserve both a defendant's constitutional rights and the fair and effective administration of justice is for judges to follow the dictates of *Barker* and examine the facts and the context before them. When courts fail to follow these dictates, the results can be disastrous, particularly given that the remedy to a speedy trial violation is dismissal.

CONCLUSION

For the foregoing reasons, and in the interest of ensuring the safety and security of victims of domestic and sexual violence, the rights of criminal defendants, the public safety, and the integrity of the criminal justice system, Amici respectfully request that the Court vacate the decision, or in the alternative, remand with clear instructions that the court should undertake a more thorough examination of the reasons for the delays, the context of the case, and the interest of public justice as required by *Barker*. The Court should further clarify that delays caused by the defendant and/or his counsel cannot serve as the factual predicate for a speedy trial claim unless those delays had nothing to do with the defendant's own conduct and were instead the result of the inability or unwillingness of the state public defender system to provide adequate counsel in a timely manner. Finally, Amici urge the Court to alert the trial and appellate courts to the particular risks of defense delay tactics in domestic and sexual violence cases

and the consequences of those delays on victims, the public, and the criminal justice system.

Respectfully submitted,

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APPENDIX

APPENDIX

The Alaska Network on Domestic Violence and Sexual Assault is the statewide non-profit coalition of twenty-one domestic-violence and sexual-assault programs from Barrow to Unalaska to Ketchikan. Our agency's mission is to work to end domestic violence and sexual assault across the state. To this end, we provide training and technical assistance as well as leadership in the development of public policy and systemic responses to reduce and eliminate violence.

Our Legal Advocacy Project ("LAP") was started in 1996 to help victims of domestic violence and sexual assaults meaningfully access the civil and criminal justice systems. The LAP works closely with the legal advocates at each of our member programs to provide services to victims. We provide training and technical assistance to these legal advocates, in addition to providing direct representation to clients through staff attorneys and our Pro Bono Program. Since the LAP's inception, we have, either directly or indirectly, helped thousands of victims of domestic violence and sexual assault to go through civil and criminal legal proceedings.

The Battered Women's Justice Project promotes systemic change within community organizations and governmental agencies engaged in the civil and criminal justice response to domestic violence in order to hold these institutions accountable for the goals of safety and security for battered women and their children.

The California Partnership to end Domestic Violence ("CPEDV") acts as a leader and catalyst for innovative, long-range plans to end domestic violence in California. CPEDV is a statewide, membership-based coalition of 195 domestic-violence service pro-

viders and other supporters, who offer a united voice on legislation and budgetary initiatives affecting victims of domestic violence and their children at the local, state, and national level. Over the course of our 25-year history, we have worked with lawmakers and our allied partners to enact over 100 statutes on these issues and have worked on amicus briefs impacting victims of domestic and sexual violence and stalking.

The Center for Survivor Agency and Justice ("CSAJ") is dedicated to enhancing advocacy for survivors of oppression-based, intimate-partner violence. We strive to meet this goal by cultivating a community of attorneys and advocates who are skilled in survivor-centered advocacy and capable of meeting the entire spectrum of civil legal assistance needs of survivors.

Since the year 2000, CSAJ has served as a technical assistance provider for the network of over 200 LAV grantees across the nation. CSAJ staff and expert consultants work closely with attorneys and advocates to provide legal and advocacy problem-solving assistance tailored to address individual cases as well as more broadly defined systemic advocacy needs. The Center for Survivor Agency and Justice staff, consultants, and national partners collaborate with attorneys and advocates to facilitate critical thinking, networking, strategic advocacy, and innovative practices.

The Domestic Violence Legal Empowerment and Appeals Project ("DV LEAP") believes that real and lasting change in legal and social responses to domestic violence requires great patience and persistence. DV LEAP provides victims with the continued support needed - often for years - to take a case through the appellate process, in order to advance

justice and achieve both system and perpetrator accountability. More specifically, DV LEAP does the following: empowers victims and their advocates by providing expert representation for appeals in collaboration with our pro-bono partners; educates and supports its pro-bono counsel through in-depth consultation, mentoring, and access to domestic-violence experts and resources; furthers community education and awareness by training lawyers, judges and others on cutting-edge issues crucial to effective advocacy; speaks for the national and local domestic-violence communities in significant cases through its "friend of the court" briefs; organizes and spearheads the domestic-violence community's advocacy in Supreme Court domestic-violence cases; supports law reform and policy initiatives in D.C. and nationally to further the rights of victims of domestic violence; and provides consultation and mentoring to lawyers and litigants in domestic-violence cases around the country. By focusing on the more powerful level of our justice system, appellate courts, DV LEAP seeks to hold trial courts to the promise of fairness embodied in the law, and to create long-term and more fundamental change in the legal system.

The Hawaii State Coalition Against Domestic Violence ("HSCADV") is a private, not-for-profit statewide coalition of domestic-violence programs. Our mission is to ensure the safety and protection of women in intimate relationships by coordinating domestic-violence prevention and intervention services, affecting public policy, and establishing coordinated and consistent procedures and actions by the civil and criminal justice systems in Hawaii. The purpose of the Coalition is to coordinate efforts to end family violence in Hawaii. The HSCADV provides education and training on family violence to service providers, collects resource materials and serves as a clearing-

house, provides technical assistance on family violence matters, and provides facilitation when requested by member agencies.

The Illinois Coalition Against Domestic Violence ("ICADV") is a non-profit organization incorporated in the State of Illinois in 1978. Through the 53-member full service domestic-violence agencies, ICADV is dedicated to the elimination of violence against women and their children through the following vision: to promote the eradication of domestic violence across the state of Illinois; to ensure the safety of survivors, their access to services, and their freedom of choice; to hold abusers accountable for the violence they perpetrate; and to encourage the development of victim-sensitive laws, policies and procedures across all systems that impact survivors of domestic violence.

ICADV has a long history of working to promote a strong criminal justice response to domestic violence, including holding perpetrators accountable for their illegal behavior through mandatory jail time, fines, and enhanced charges for subsequent domestic violence. ICADV was instrumental to passage of the model Illinois Domestic Violence Act of 1986 legislation and worked for enactment and implementation of the Violence Against Women Acts of 1994, 2000, and 2005.

The Iowa Coalition Against Domestic Violence ("ICADV") is a non-profit organization, incorporated in the state of Iowa in 1985. ICADV provides educational and technical assistance to the domestic-violence programs across Iowa, and also acts on a statewide and national level to promote public policy and legislative issues on behalf of battered women and their children. ICADV's purpose is to eliminate personal and institutional violence against women

through support to programs providing safety and services to battered women and their children. ICADV recognizes that unequal power contributes to violence against women. Therefore, ICADV advocates social change, legal and judicial reform, and the end to all oppression.

The Kansas Coalition Against Sexual and Domestic Violence ("KCSDV") is a non-profit organization incorporated in Kansas since 1988 with several member programs. KCSDV seeks to protect the interests and missions of these member programs and the women who are battered or formerly battered as well as sexual assault survivors. KCSDV has extensive expertise on the physical, sexual, emotional and economic dangers women and their families face on a daily basis. KCSDV and its member programs work closely with courts, legislators, law-enforcement agencies, prosecutors, and the media across the state to provide a more effective and safer network to protect victims of sexual and domestic violence.

The Kentucky Domestic Violence Association ("KDVA") is a not-for-profit organization founded in 1981 and incorporated in the State of Kentucky. It is dedicated to advocating for safety and justice for battered women and their children, and provides comprehensive services to families through fifteen shelter programs located across the state. KDVA serves as the state domestic-violence coalition and provides training, technical assistance, and support for a wide variety of victim service providers across the state as well as shelter program staff. KDVA also works with state legislators to draft and enact strong laws, which will provide needed safety for victims to enable them to leave abusive situations. KDVA is active in promoting both effective civil protective order legislation and criminal statutes, which will hold abusers accountable for their criminal acts.

The National Network to End Domestic Violence ("NNEDV") is a non-profit membership organization devoted to remedying domestic violence through legal, legislative, and policy initiatives. The members of NNEDV are the state coalitions against domestic violence, who represent their states' local organizations that provide shelter, advocacy, and legal and counseling services to survivors of domestic violence. The member organizations of NNEDV collectively represent thousands of organizations that have hundreds of years of experience working with survivors of domestic violence, including undertaking extensive efforts to improve the justice system's response to victims of domestic violence.

The New Jersey Coalition for Battered Women ("NJCBW") is a statewide coalition of domestic-violence service programs and concerned individuals whose purpose and mission is to end violence in the lives of women. Incorporated in 1979, NJCBW is a private, non-profit corporation whose members include 28 domestic-violence programs in the State of New Jersey. NJCBW advocates for battered women with state-level governmental and private agencies, the state legislature, judiciary, and governor to support legislation and policies that will increase the safety and options of victims of domestic violence. It also provides information, resources, technical assistance, and training to domestic-violence programs, the public and those agencies, organizations and individuals involved with New Jersey's response to domestic violence.

The New York State Coalition Against Domestic Violence ("Coalition") is a not-for-profit membership organization whose mission is to eradicate domestic violence and to ensure the provision of effective and appropriate services to victims of domestic violence through community outreach, educa-

tion, training, technical assistance, and policy development. The Coalition's principles and practices prioritize the safety and concerns of women who are abused, provide support and encouragement for the participation of women who are abused in the struggle to eradicate personal and institutional violence against them, and provide for a non-competitive atmosphere that fosters open communication, respect, and cooperation among advocates and women who are abused. Since its inception in 1978 in Woodstock NY, the Coalition has been a driving force in the development of hundreds of programs throughout New York State that provide services for women who are abused and their children. As the only statewide domestic violence coalition in New York, members include all residential and non-residential programs in the state that are licensed by the NYS Office for Children and Family Services (OCFS) as well as a host of other programs in NYS that serve women who are abused and concerned individuals who share the Coalition's goal of ending domestic violence.

The South Carolina Coalition Against Domestic Violence and Sexual Assault ("SCCADVASA") is a statewide membership organization representing the 23 member programs across the state serving victims of domestic and sexual violence. Founded in 1981, SCCADVASA is involved in public policy, training and public-awareness efforts throughout South Carolina to prevent and eradicate domestic violence and sexual assault.

The Vermont Network Against Domestic and Sexual Violence was founded in 1988 as a statewide coalition of domestic- and sexual-violence programs with a state office in Montpelier. The 16 Member Programs are located around the state and provide direct services and advocacy for and on behalf of victims and survivors of domestic- and sexual-

violence in their communities. All adhere to basic standards of service as a prerequisite to their membership in the Network, and out of a deep, shared commitment to victims and survivors.

The Victim Rights Law Center ("VRLC") is the first law center in the nation dedicated solely to serving the legal needs of sexual assault and rape victims. The VRLC provides free legal services in matters involving physical safety, housing, employment, immigration, privacy, financial compensation, and victim rights in the criminal justice system

The Virginia Poverty Law Center ("VPLC") is a not-for-profit organization concentrating in the areas of law that affect low-income families. Established in 1978 to advocate on behalf of low-income Virginians on poverty issues of statewide importance, VPLC is the only state-wide organization providing training to local legal aid program staff, private bar attorneys, and low-income clients, relating exclusively to the legal rights of Virginia's poor.

The Domestic Violence Project addresses the legal needs of victims of domestic or intimate-partner violence through training and technical assistance to legal aid and private attorneys, advocates and other service providers, legislative advocacy, and direct legal representation in limited situations

The Virginia Sexual and Domestic Violence Action Alliance ("Alliance") is a diverse group of individuals and organizations that believe ALL people have the right to a life free of violence. We recognize that sexual and domestic violence are linked to other forms of oppression, which disproportionately affect women, children and other marginalized people, harming individuals, families and societies as a whole. We will use our diverse and collective voices to create a Virginia free from sexual and domestic vio-

lence and to inspire others to join and support values of equality, respect, and shared power.

The Alliance works to end domestic and sexual violence in Virginia through accreditation of local sexual-and domestic-violence agencies, prevention initiatives, public-awareness campaigns, public policy efforts, outreach to underserved populations, training, resource development, and education.